Report on the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario

Ontario
Ministry of
the Attorney
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MEMBERS OF COMMITTEE

Robert Carter, Esq. Q.C.

Brendan O'Brien, Esq. Q.C.

Clay M. Powell, Esq. Q.C.

James M. Tory, Esq. Q.C.

Hon. Arthur Kelly
(Chairman)

Letter of Transmittal

The Honourable R. Roy McMurtry, Q.C.,
Attorney General for Ontario.

Dear Mr. Attorney:

We have the honour to submit herewith the Report of the Committee appointed by you,

> "to examine the present, and explore the future needs in Ontario with respect to the present appellate jurisdiction and function of the Supreme Court of Ontario and to make recommendations as to methods of meeting and satisfying those needs:
>
> and without limiting the generality of the foregoing,
>
> (a) to expound acceptable principles with respect to the right to appeal from judicial decisions in litigious matters.
>
> (b) to propose lines of demarcation between the objectives and functions of such appellate courts as are recommended to be continued or established.
>
> (c) to recommend processes for maintaining the adjustment of the capacity of the appellate courts to the needs of the people of Ontario."

We have the honour to be,

Sir,

Your obedient servants,

March 10, 1977.

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SUMMARY OF CONTENTS

Chapter 1

Introduction

In the last ten years, the volume of appeals presented to the appellate courts of the Province of Ontario has grown beyond all predictions .

The Court of Appeal has made a substantial effort to hear currently every appeal ready for argument. As a result, the pressure under which it is operating has not been as readily recognized outside the Court as would have been the case had there been a substantial delay in hearing appeals. However, to those closely acquainted with the performance of the Court, as well as to the members of the Court itself, it has been apparent that the increasing pressure upon the Court would, in the near future, jeopardize the quality of its performance and endanger the maintenance of the standards of quality the public of Ontario has enjoyed and has the right to expect from its court of final resort in the Province.

In the fall of 1975 the Court of Appeal, in a memorandum to the Attorney General, drew his attention to their apprehensions as to the ability of the Court to continue to work effectively. The response of the Attorney General was immediate: he appointed this Committee, the terms of reference of which, broadly stated, are: to examine the exercise of the appellate jurisdiction of the Supreme Court of Ontario as a means of meeting the appellate needs of the Province and, if necessary, to formulate a more effective means of discharging the appellate function.

At the outset a few general remarks are appropriate as to the approach the Committee has adopted in formulating this Report.

In approaching our task as we conceive it, we have sought to avoid being unduly influenced by the existence of the Court of Appeal and the Divisional Court as separate appellate tribunals. Rather we have approached the consideration of the needs of the province as if we were creating afresh a system of appellate courts adequate to discharge the appellate duties now imposed on both those Courts.

In civil matters the appellate jurisdiction of the Supreme Court of Ontario is exercised (i) by single judges of the High Court of Justice (ii) by the the Divisional Court composed of members of the High Court of Justice and (iii) by the Court of Appeal. In criminal matters, the Court of Appeal exercises appellate jurisdiction conferred by Section 603 of The Criminal Code.

With respect to appeals heard by single judges of the High Court of Justice, no practical problem arises since the continually increasing work load of the court can be met by the appointment of additional judges. Accordingly we do not consider it necessary to make recommendations as to this appellate jurisdiction and have not pursued in depth any studies in that regard.

In our view, the problems of the Supreme Court in the appellate matters which require our consideration relate to those appeals which are now directed to the Court of Appeal and to the Divisional Court in its capacity as an appellate

court (in contrast to its capacity as a forum within The Judicial Review Procedures Act).* Accordingly, we have limited our investigations and considerations to these appeals.

We consider that the jurisdiction of the Divisional Court under the Judicial Review Procedures Act, since it is essentially supervisory as opposed to appellate does not fall squarely within our terms of reference. Nonetheless, we realize that, in dealing with what is clearly part of the appellate jurisdiction of the Supreme Court, it is not inappropriate that we comment upon the effect that the implementation of our recommendations will have generally upon the Divisional Court.

Our recommendations, insofar as they extend to or affect the Divisional Court, are referrable only to its appellate jurisdiction exercisable with respect to appeals from the decision of courts or judges of first instance.

Under the Criminal Code Parliament has constituted the Court of Appeal as the appellate court in Ontario for appeals in proceedings by indictment. Despite the broad powers of the Court to make rules of Court, Parliament alone can make any basic changes in the criminal appellate jurisdiction.

We are making no recommendations to the Government of Canada as to criminal appeals because that would be beyond the scope of our commitment. However, as criminal appeals account for a substantial percentage of the cases before the Court of Appeal, it would be unrealistic in making our recommendations to disregard the necessity of accommodating criminal appeals within the appellate structure of the Supreme Court of Ontario.

We believe that the hearing of criminal appeals in the manner we have recommended in this Report will not require any amendment to the Criminal Code.

In the course of our deliberations we have sought expression of opinion from the profession and in particular from those who had experience in the appellate courts of Ontario, and have examined the systems which have been developed in other jurisdictions which have already coped with the problem of insufficient capacity in their appellate courts to meet the current work load.

We sent a questionnaire to every member of the Law Society of Upper Canada: some 700 answers were received and we have taken into consideration the views that were expressed in them; the Benchers of the Law Society of Upper Canada, the Advocates Society and the Criminal Lawyers' Association each appointed a committee with the members of which we had fruitful discussion; representatives of the teaching faculties of the law schools of Ontario were consulted, and presentations were received from all of them. On an individual basis, members of the committee personally interviewed many experienced counsel from whom useful suggestions emanated.

As a result of meetings with members of the Court of Appeal, they were made aware of our objectives and our views as to the possible ways of achieving them: lengthy consideration was given by the members of the Committee to the views expressed to us by the members of that court.

A joint meeting of the Law Society of Upper Canada and the County and District Law Associations afforded to us an opportunity to outline to the

*Statutes of Ontario 1971, c.48.

meeting the possibilites which were under consideration: we had an excellent opportunity to assess the reactions of those representatives. There was a similar meeting with members of the Advocates Society.

As well as familiarizing ourselves with a large volume of reference material, personal investigations were made into the operation of appellate courts elsewhere. A member of the Committee visited England, Scotland and Ireland, and another member visted Australia and New Zealand. Members of the Committee have also examined the appellate system in the other provinces of Canada and in several of the United States of America.

We have given careful consideration to the MacKinnon Report on the jurisdiction of the Supreme Court of Canada and the resulting legislation whereby appeals to that court lie solely by leave. We recognized that this Report dealt with a somewhat different problem in that, in the Supreme Court of Canada, the judgments or orders sought to be reviewed have already been scrutinized by at least one appellate court.

In Appendix B we have set out some of the significant features which distinguish the operation of appellate courts in England and some of the larger American states from those of Ontario, and have made general comments as to their suitability for adoption in Ontario.

Our work fell into two parts. In the first stage, which was largely directed to investigation of and familiarization with other appellate systems, a vast quantity of material was made available to the members of the Committee and was the subject of individual study, but our meetings were comparatively few. The latter stage was directed to the development of the concept of the appellate process which we were eventually to recommend and the related recommendations as to procedure, staffing and ancillary matters. During this period our meetings became more frequent and longer; they were preceded by the circulation of drafts to be the foundation of the discussion at the meeting and of the comments of each member on the drafts. No attempt has been made to keep track of the number of individual conferences between members of the Committee. We have met 14 times formally and several of the meetings lasted a whole day, a number half a day and the balance extended over some hours.

It would not be realistic to say that the final report as presented is in the form which every member of the Committee would have drafted it, but it is a matter of great satisfaction that the conclusions which are set out in our recommendations are those to which all members of the Committee subscribe without reservation.

The final draft as approved by the Committee was submitted to Professor Bertie Wilkinson as literary editor to whom we are indebted for many valuable suggestions and comments.

In the following chapters are our recommendations as to the structure of courts within the Supreme Court of Ontario to exercise appellate jurisdictions now vested in the Court of Appeal and the Divisional Court; as to the respective jurisdictions of the Courts the constitution of which we have recommended, and as to the procedures to enable those courts effectively to perform their functions.

Chapter 2

Historical Note

Prior to 1881, there existed in Ontario four separate courts: the Court of Appeal, the Court of Queen's Bench, the Court of Common Pleas and the Court of Chancery, each of which was autonomous and was organized with its own Chief Justice, Judges, Registrar and staff. After the pattern of the English Act of 1854, the Judicature Act of 1881 amalgamated these courts into one court under the name "Supreme Court of Judicature for Ontario" having two principal divisions, the Court of Appeal and the High Court of Judicature. The High Court of Judicature consisted of three divisions, the Queen's Bench Division, the Common Pleas Division and the Chancery Division.

The Divisional Courts of the High Court of Judicature which sat in panels of three enjoyed a limited appellate jurisdiction which originally was largely in matters such as: appeals from a judge in chambers; proceedings directed under statutes; cases of habeas corpus in which a judge directed a writ to be returnable before it; cases where the parties agreed to its jurisdiction; and applications for a new trial in the High Court when the action had been tried by a jury. All other appellate jurisdiction was vested in the Court of Appeal.

Since an appeal lay from the Divisional Courts to the Court of Appeal the system was a two-tiered one. By successive amendments to the Judicature Act, the jurisdiction of the Court of Appeal had been progressively limited. By the first decade of the century that jurisdiction was confined to appeals with leave from decisions of the Divisional Court given on appeal from decisions of High Court Judges in court, where an appeal would lie from that court to the Supreme Court of Canada, and appeals under certain statutes, including the Criminal Code. The Court of Appeal was thus reserved for only the most important cases.

Concern over the costs of successive stages of appeal seems to have prompted legal action although the report of the Law Reform Commission on the Administration of Ontario Courts at page 221 made the following reference to that situation: "there is some doubt that the incidence of double appeals posed a problem. At any rate, the measures taken to eliminate them were much criticized at the time."

In 1909, the Legislature adopted certain resolutions preliminary to amending the Judicature Act, one of which provided for the abolition of the existing Court of Appeal and the constitution of a Court of Appeal, the membership of which would be drawn on a rotating basis from the judges of the three divisions of the High Court of Judicature. This proposal met with vigorous opposition from the Ontario Bar Association which, at a meeting held in 1909, went on record insisting that the highest appellate court in Ontario must be a permanent court, the members of which would devote their full time to the hearing and deciding of appeals.

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*More detailed history of the courts in Ontario from 1791 to 1919 is to be found in "Canada and its Provinces", Vol. 18, p. 512 under the authorship of Charles Mulvey, some-time Under-Secretary of State for Canada; and in Report of Ontario Law Reform Commission on Administration of Ontario Courts, (1973) Vol. 1, p. 218.

The resulting legislation, which became effective in 1913 was more moderate than the resolutions. The Divisional Courts were abolished, the Court of Appeal was reconstituted as the Appellate Division of the Supreme Court of Ontario to have two divisions, the First Divisional Court of five judges being life-time appointments as appellate judges, the Second Divisional Court being a court, the five members of which were annually selected from among the judges of the High Court Division.

With the abolition of the Divisional Courts of the High Court of Judicature, all curial appeals, save in interlocutory matters, were directed to a Divisional Court of the Appellate Division of the Supreme Court of Ontario. Despite the possible confusion resulting from the use of the word "Divisional", the 1913 reorganization of the appellate system transformed it from a two-tier one to a single-tiered one.

After a period of unsuccessful experiment, in 1923 the membership of the Second Divisional Court was made permanent, the five members thereof receiving patents as appellate judges: the two Divisional Courts within the Appellate Division continued for some years to operate independently, during which time it was only on rare occasions that a member of one sat as a member of the other. Eventually, in 1931, the two Divisions were merged into one permanent body of eight members renamed the Court of Appeal, provision being made that vacancies occurring in it would not be filled until the total membership had been reduced to eight. In 1949, the size of the Court was increased to ten.

In 1922, Parliament amended the Criminal Code to provide for the first time a right of appeal in all indictable offences. The right of appeal with respect to a question of law was absolute and with regard to a question of mixed fact and law, a question of fact or sentence, was by leave. One of the arguments advanced in Parliament in favour of the establishment of this right of appeal was that the courts of appeal dealing with civil matters in various provinces could handle the appeals in criminal matters without inconvenience. For Ontario this assessment proved to be true at the time, as the addition of the right to appeal under the Criminal Code did not overload the Court of Appeal for nearly 40 years.

During the period 1913-1957, in addition to appeals in matters originating in courts, provincial statutes in a progressively increasing number made provision for appeals from statutory bodies. By 1966, some 74 such statutes were on the books.

Growth both in population and commercial and industrial activity in the post-war years escalated the volume of appellate work. By the middle 1960's, the Court realized that the continuance of the trends then visible would rapidly make it impossible for the Court to perform its role satisfactorily.

In 1967, representations were made to the then Attorney-General urging the adoption of suggestions for alleviating the conditions of overloading. They were received and acknowledged, but no remedial action followed until 1972, when the present Divisional Court of the High Court of Justice was constituted, and appellate jurisdiction was conferred on it in all civil matters save appeals from final judgments of the County Courts and the Supreme Court of Ontario.

By the time the Divisional Court began to hear appeals, any reduction in the volume of appeals coming before the Court of Appeal brought about by the diversion of some appeals to the Divisonal Court was more than overshadowed by

the unprecedented increase in the number of matters seeking appellate review. This increase was most evident in criminal appeals, the growth of which vastly accelerated when legal aid was introduced so that by the latter part of 1975 close to 40 percent of the court's time was taken up in the hearing of criminal appeals, and in addition a substantial part of the time of the judges was occupied by the reading of prisoner appeals in writing which were presented to the Court without the assistance of solicitors.

In the report of the Law Reform Commission on the Administration of the Court, suggestions were made to increase the jurisdiction of the Divisional Court so as to bring about a reduction in the case load of the Court of Appeal, but these recommendations were not implemented.

In the absence of remedial legislation, and to meet a situation which was becoming intolerable, the Court of Appeal, which had previously resisted any attempt to increase its size, asked for the addition to the Court of judges to bring the total membership to 14. These appointments were made in 1973 and 1974. Since then the Court of Appeal has had a membership of fourteen.

The relief afforded by the addition of these judges was but temporary and by the middle of 1975 the inadequacy of the remedial measures had been demonstrated. As a result, the request already referred to was made by the members of the Court of Appeal to the Attorney-General for the constitution of a committee to study and report upon the needs of Ontario with respect to appellate courts.

Chapter 3

Growth in Volume

Such measures as have been taken recently to relieve the pressure on the Court of Appeal appear to have been related only to the alleviation of an existing condition without regard to its probable recurrence, and have had but temporary effects. On this account we are convinced that we should direct our recommendations towards the creation of a structure which will be adaptable to the requirements of Ontario for at least twenty-five years and which we hope will make up in part for the limitation on the right to appeal to the Supreme Court of Canada.

To illustrate the expanding demands on the Court of Appeal, Table 1 sets out in graphic form the number of civil appeals directed to the Court in the years 1967-1975 and Table 2 the number of criminal appeals during each of the same years. (overleaf)

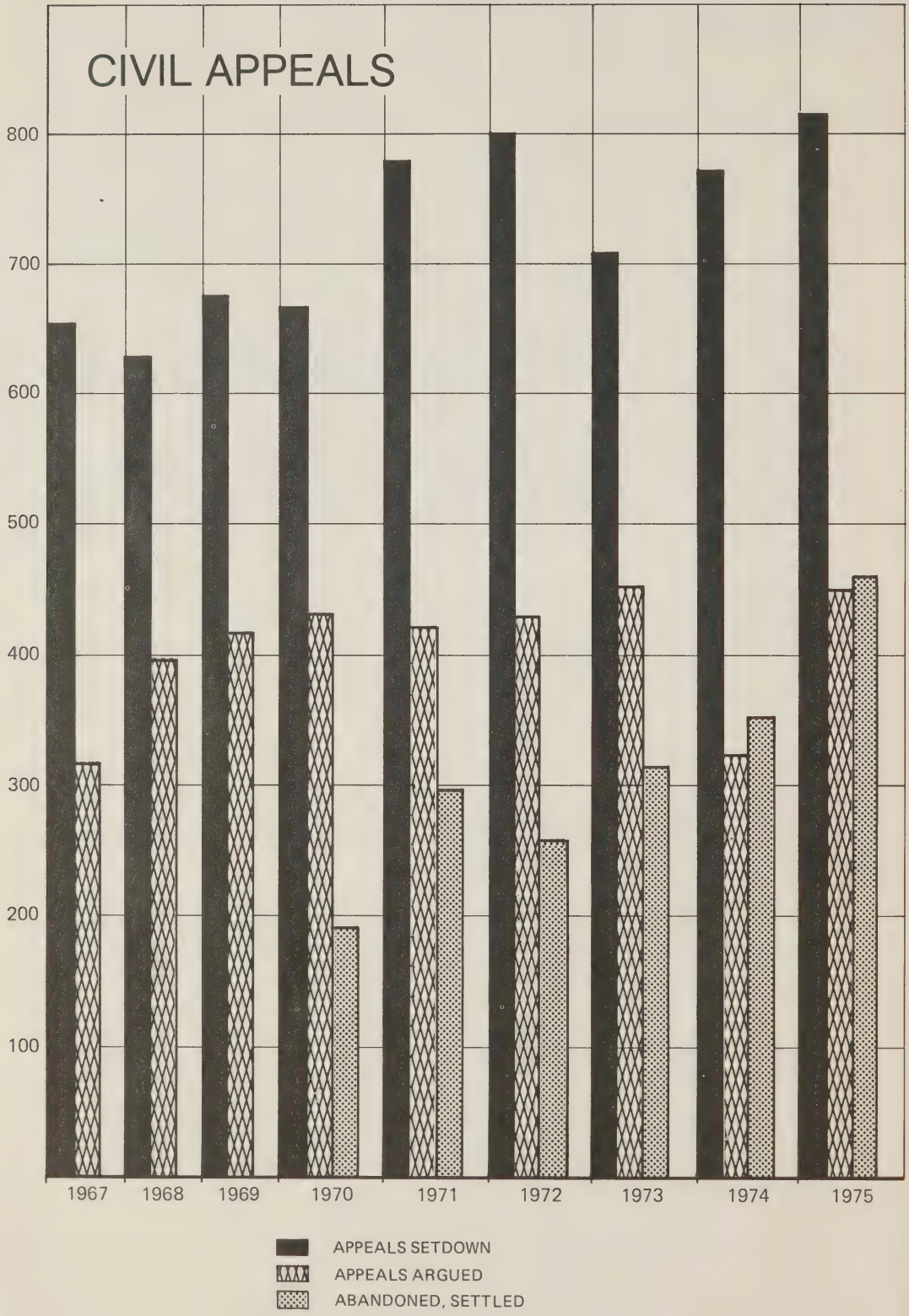
Such increases are a reflection of the expanding demands on the administration of justice apparent in the increase in the number of trial judges whose judgments may be appealed and in the number of lawyers eligible to appear in the trial courts. These latter increases from 1951 to 1976 are now set out.

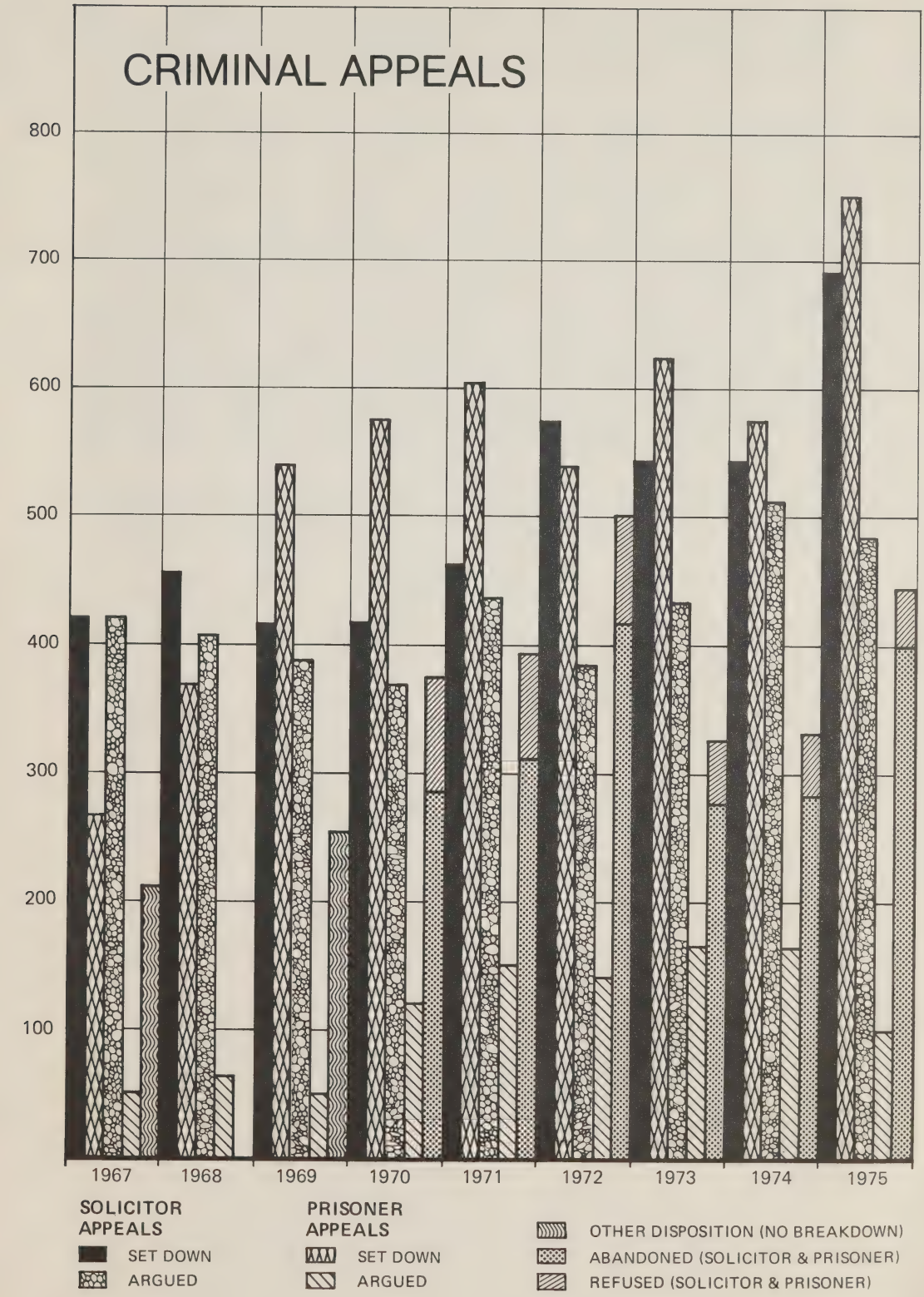
Judges	1951	1961	1976
Supreme Court (Trial)	19	21	36
County Court	62	69	118
Provincial Courts (Criminal and Family)	134	151	186
	215	241	344
Lawyers	3,932	5,316	10,691

In the past some fluctuations have appeared from time to time in the volume of appellate work generated in the Province, despite which the overall trend has been upwards whether the measure applied be the number of appeals initiated or the time occupied in hearing appeals.

With some weighting with regard to age groups, the relationship of civil cases to population has remained and should continue to remain fairly constant. But the number of appeals taken alone is a misleading indicator of the demands on appellate courts. The complexity of appeals brought to the court has become a factor of increasing importance.

Over the past decade the number of criminal appeals has grown twice as fast as the population, the ratio of criminal appeals to population have increased in 8 years from 1-10360 to 1-6600. A major part of the increase coincides with the introduction of the Ontario Legal Aid Plan and accordingly will not be recurring. Other enlarging influences, however, are present, particularly the growing emphasis on the protection of the rights of the individual and increasing demands for stricter law enforcement. There is no reason to expect that the present ratio of criminal appeals to population will decrease.


CIVIL APPEALS
800
700
600
500
400
300
200
100
1967
1968
1969
1970
1971
1972
1973
1974
1975
APPEALS SETDOWN
APPEALS ARGUED
ABANDONED, SETTLED


CRIMINAL APPEALS
800
700
600
500
400
300
200
100
1967
1968
1969
1970
1971
1972
1973
1974
1975
SOLICITOR APPEALS
SET DOWN
ARGUED
PRISONER APPEALS
SET DOWN
ARGUED
OTHER DISPOSITION (NO BREAKDOWN)
ABANDONED (SOLICITOR & PRISONER)
REFUSED (SOLICITOR & PRISONER)

Other factors which we have mentioned may well bring about more rapid expansion of appellate needs; but the impact of population will be inescapable and must set the floor for the needed increase in the capacity of appellate courts.

In relying on population projections as an indication of the future demands on the appellate courts of Ontario some considerations must be given to the relative size of certain age groups. Whether resort to the courts be in civil matters or in criminal matters, the users of the court are largely within the age group of 18 - 60. As a consequence, the influence on the courts of the baby boom of the post-war years did not begin to make itself felt until the middle 1960's. For some time to come the population in those age groups is likely to form a higher percentage of the total population than it did before 1950. Accordingly for at least the next 10 years the volume of appeals will probably grow more rapidly than the total population.

In Catalogue 91-514 of Statistics Canada "Population projections for Canada and the provinces 1971 - 2001" the projections are set forth in four separate sets designated A, B, C and D. In Appendix C we have set out the text of the Catalogue in which are specified the assumptions which underlie each of these sets of projections. Stated briefly fertility rates and rates of migration in different combinations produce results which are stated in descending order, D being the most conservative.

From Table 6 - 2 of the same Catalogue we have extracted the following data as being the most significant.

Population Projections
(000 Omitted)

Year	Assumption A	Assumption B	Assumption C	Assumption D
1971	7703*			
1976	8530	8370	8343	8290
1981	9762	9187	9028	8904
1986	10935	10073	9747	9548
2001	14598	12518	11628	11183

From Chart 9.2 of Catalogue 91-514, we have estimated that the age group 20 - 64 will represent the following percentages of projections A and C.

	A	C
1971	52.5	52.5
1976	54.5	55.5
1981	56	57.5
1986	56	60
2001	56	62

At the present time 14 judges are engaged in hearing appeals directed to the Court of Appeal, and the equivalent of the full time services of 2 judges of the High Court of Justice is taken up with the appellate cases heard by the Divisional Court. These 16 judges are overloaded by the work now directed to them. In our view, the present volume of cases calls for the time of 18 judges.

*Actual

To maintain the equivalent relationship to population the number of appellate judges required would be, in the future, on each of the foregoing assumptions, as follows:

	A	B	C	D
1986	24	22	21.5	21
2001	32	27.5	25.5	24.5

Were we required to make an estimate of the precise number of appellate judges required at any future date, we do not believe that the most conservative of the projections should be the foundation for the estimate. But assuming that the actual population will be somewhere between the highest and the lowest of the projection, in the next 10 years the number of appellate judges required in Ontario made necessary by the influence of population alone will be between 21 and 24 and by the end of the century the number required will, in all probability, be some place between 25 and 32. These figures do not take into consideration the additional requirements that may be generated by the activity of the legislature adding to the fields of law which are now bringing to the courts a large volume of appellate work. By way of example, we mention the United Family Court Act passed by the Legislature in 1976 but not yet proclaimed.

The realization that the perpetuation of the present appellate system would be likely to result in a court of such size has, understandably, broadened the range of the possible solutions to which we have given consideration.

Chapter 4

The Appellate Process

Our proposals for the solution of the problems created by the increasing appellate workload involve more than procedural changes and if implemented may well affect the character of the appellate process. On this account, we believe that, at the outset, there should be set out our concept of the nature of the process and its purpose toward the attainment of which our recommendations are to be directed.

The Report of the Ontario Law Reform Commission on the Administration of Ontario Courts at page 215 of Part I defined the major role of the Court of Appeal as follows:

> "To resolve differences between the parties having causes before it and to develop jurisprudence for the Province."

While we do not disagree with this definition, it appears to us to be unduly limited. We consider that a more comprehensive outline of the functions of appellate courts will perhaps be helpful as a background to the approach which we have taken in formulating the recommendations contained in this report.

Patently the resolution of every appeal before an appellate court affects the parties to that appeal: to the extent that the decision of the appellate court depends upon the application of well-established law to the facts peculiar to that case, only the parties are affected.

From the point of view of the litigants, the availability of an appeal to a reviewing forum has many advantages. The presence of the reviewing body has in itself a salutary effect on the conduct of the trial. In rare cases in which error occurs in the trial court, any dissatisfaction felt by a litigant may be corrected and is not left to engender frustration and resentment by reason of enforced acquiescence in the original result. A dissatisfied litigant may have his complaints as to the proceedings and the judgment of the lower court examined by a court, usually with more than one judge, specializing in the searching appraisal of the conduct of the trial and the judgment rendered by the trial court. To meet the desires of most litigants the goal of the appellate court must be to hear and decide every appeal expeditiously and without delay.

In reviewing decisions of a court of first instance, the appellate court also performs the essential function of stabilizing the law. The courts from which appeals lie are usually numerous and presided over by a variety of judges. Unless there be some accepted standards and principles, to which the judges are expected to conform, differences of opinion could inevitably arise and would tend to increase over time, leading ultimately to a lack of uniformity pervading the legal system. Each appellate court provides this stability at its level being a focal point to which streams of decisions converge, each from a separate lower court, with its pronouncements affording the standards and principles to be followed thereafter by them.

The common law has provided our legal system not only with stability

resulting from an uniform application of accepted principles but also with flexibility to overcome the stultifying effect of immobility. The appellate courts are thus called upon to perform an equally important role in applying enduring principles to changing social and economic conditions, thereby avoiding the sterility which undermines laws that do not remain relevant to the prevailing conditions.

In providing stability and flexibility, the work of an appellate court has a public impact beyond its effect upon the litigants concerned. Its decisions provide an ongoing exposition of the law to be applied to the causes of future litigants and to be expounded by the legal profession to those who wish to order their affairs in conformity with the law.

This phase of the work of an appellate court was aptly described by The Lord Chancellor of England, the Right Honourable Lord Elwyn-Jones, P.C., in an address delivered at the Celebration of the Centenary of the Supreme Court of Canada, in September 1975, when he said:

> "Law-making enters the appeal process when it becomes necessary for the appeal court to seek out and declare the law applicable to the case. In all systems an appeal court has the task of correcting errors of law made by the court of trial. But in a system which looks to judicial decision as a source of law and accepts the principle, subject to some exceptions, of stare decisis, an appeal court's ruling upon a question of law goes beyond the function of doing justice between the parties and acquires public importance as a binding declaration of what the law is."

The importance of the availability of an appeal to the individual is not to be denigrated, and the recognition of his need with respect to early finality must be apparent in the structure of the court and demonstrated by its procedures.

But the appellate court must seek to clarify, delineate, and develop the law, and this role cannot be sacrificed merely to achieve expedition in the majority of cases. Were anything necessary to impress upon us the importance of this function, it is to be found in the consequences of the amendment to the Supreme Court of Canada Act making the granting of leave to appeal a prerequisite to every appeal to that court. Since the target of the Supreme Court of Canada is to hear something less than one hundred and fifty appeals a year, it is reasonable to estimate that 90% of the appeals decided in Ontario will not have the opportunity of being reviewed in the Supreme Court of Canada. The practical result of this situation is that henceforth the decisions of the courts of Ontario will develop the jurisprudence of Ontario.

The appellate system, to be effective as such, must be directed to two ends:

Speedy justice for the litigant;
Sound jurisprudence for the Province.

Our recommendations are directed to the attainment of these ends.

Chapter 5

Solutions Considered

In Chapter 3 we have set out an estimate of the number of judges that would be required to meet the expanding case load to the end of the century.

Before recommending any increase in the number of judges, we have carefully considered other steps which have been suggested to us as appropriate to reduce the case-load of the appellate courts or enhance their ability to handle an increased appellate case-load.

Reduction in Number of Appeals

In looking at the possibility of reducing the number of appeals we first attempted to identify categories of cases which might be denied access to the appellate courts. In other words, are there cases in which it could be said to a litigant or class of litigants "Regardless of the merits of your case you may not have access to an appellate court".

In this we faced a fundamental difficulty. Even if it be accepted that the availability of an appeal from a final judgment or order is not an inherent right, the universality of the opportunity to appeal from every final judgment or order, available save in some matters dealt with by the Small Debts Courts, has led to the acceptance of at least one appeal as an integral part of our judicial system. It is now so firmly entrenched in the traditions of our courts that any effective restriction on the ability of the dissatisfied litigant to call for a review by a superior court might well be looked upon by the public as a denial of a time-honoured right. In addition it is our conviction that it would not be in the public interest to restrict the power of the appellate court to redress errors occurring in courts of first instance by making absolute the final decision of such a court.

On this account we rejected the denial, in defined classes of cases, of one appeal.

Reduction in the Time Engaged in the Hearing of Each Appeal

A commonly voiced demand is for the expediting of the hearing of appeals by the reduction of the time in which the court would be engaged in hearing oral argument: we examined this as a means of enabling the present courts to meet the increasing case load.

Insofar as this would involve a limitation on the length of time in which a court is prepared to hear oral arguments, we have no hesitation in saying that it should be rejected. In the great majority of cases counsel are aware of their obligation to the court to present their cases clearly and succinctly, and do not encroach upon the time of the court. In the exceptional cases where counsel tend to be too verbose, the appellate courts are well able to protect themselves.

In the majority of cases which come before the appellate courts there is no reliable measure by which one can predetermine the amount of time which is required for the effective presentation of the appeal. Arbitrary time limits will prove to be either too long or too short in most cases. We feel that the proper

measure of the time for the court to be engaged in hearing an appeal must depend upon variables which preclude the possibility of estimating in advance the appropriate time for the hearing of any particular appeal.

An analysis of all civil appeals heard by the Court of Appeal in the years 1973, 1974 and 1975 has shown that, although some cases have taken time which is measured in weeks rather than hours, the average time devoted to the hearing of a civil case has been about one and three quarter hours, a fact which demonstrates the ability of an appellate court to ensure the effective use of its time.

We are thus strongly opposed to any procedures which would arbitrarily reduce or define the time devoted by the court to hearing any particular appeal.

Written Argument

Written argument has been widely advocated as a device to enable the courts to hear more appeals in any given period. Later (Chapter 11) we discuss the relative merits of oral and written argument. As stated there, we find no reason to believe that the use of written argument would save judicial time: any reduction in the time taken up on the argument of an appeal would be more than made up for by the consumption of judicial time in the reading of the written arguments.

Assistants to Judges

The provision of properly qualified assistants to appellate judges has also been suggested as a means of increasing the efficiency of the court. The hearing of argument, the making of decisions, and the formulating of the reasons for such decisions is judicial work which cannot be delegated and must be done by judges. No mechanism which exists to assist the judges should make possible any encroachment on these judicial functions. While in our opinion it is essential to avoid the dissipation of judicial time by relieving the judges, as far as possible, of every activity which is not essentially judicial, we are not convinced that any steps taken to achieve this result will sufficiently enlarge the capacity of the court to meet its growing work-load.

Procedural Changes

Procedural changes in the "streamlining of the process of appeals" are no doubt overdue. Recommendations made later are a recognition of this. But such changes will not, in our view, in the aggregate significantly increase the capacity of the appellate courts.

Enlargement of Jurisdiction of Divisional Court

The expansion of the appellate jurisdiction of the Divisional Court by transferring to it some classes of appeals now heard by the Court of Appeal would not reduce the number of judges required to dispose of any given number of appeals. Any reduction in the number of judges required in the Court of Appeal would require a corresponding increase in the number of judges available to sit in the Divisional Court. Further, such a transfer does not commend itself to us, partly because the Divisional Court in its appellate aspect, is truly an "intermediate" court and partly because of our views elsewhere expressed that for the effective discharge of the duties imposed on an appellate court, that body should have a membership specifically and permanently attached to it.

The fact that, unavoidably, litigants are subjected to further delay and added expense by an extra stage of appeal in an "intermediate" court of appeal we consider to be a cogent reason for not enlarging the appellate jurisdiction of the present Divisional Court; and the experience in Ontario with the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario in the decade following the 1912 amendments to the Judicature Act re-inforced by the experience with the present Divisional Court since 1972, in our view has demonstrated that continuity in its membership is a factor of prime importance in maintaining consistency and coherence in the decisions of an appellate court.

Chapter 6

Solution Recommended

As we consider that the demands upon the appellate courts cannot be significantly reduced by the adoption of any or all of the proposals mentioned in Chapter 5, we must conclude that Ontario cannot avoid both an immediate increase in the number of appellate judges and a continual enlargement of their number as the years go by, whether this increase is brought about by adding to the membership of the present appellate courts or by creating another appellate court of limited jurisdiction.

If there is to be this increase in the number of judges, we are then faced with the difficult problem of determining how the appellate courts should be organized and how the appellate workload should be distributed among them. There appear to be two alternatives:

1. A single court to which all appeals would be directed, this court sitting in panels of 3, 5 or more, or as directed by the Chief Justice.

2. Two or more separate courts or sections of a single court to each of which a number of judges would be appointed permanently with the distribution of appeals between or among such courts, or sections by some criteria such as the monetary amount involved, the subject matter of the appeals: (e.g. -- family law appeals or criminal appeals) the court from which the appeal lies or the importance of a legal question involved.

If the second alternative were adopted a further question arises as to whether each of these courts is to be considered a terminal point for the appeals directed to it, or whether one of the courts is to be considered an intermediate stage from which a further appeal would lie to the other court.

At this point we might mention that many solicitors answering our questionnaire were in favour of the second alternative, with the existing jurisdiction of the Court of Appeal being split between two divisions one hearing exclusively criminal appeals and the other civil appeals. For the reasons stated in the chapter immediately following, we have not adopted this view.

In Chapter 4 we have set out our concept of the two important functions of an appellate system, namely (i) the expeditious handling of appeals to settle with finality the differences between the parties to the appeals, and (ii) the resolution with more deliberation of appeals which bring into play the law-developing function of the court. Obviously, any organizational structure which we recommend must enable courts to fulfil, with equal effectiveness, both of these functions without sacrificing either one to advance the other. Withal we are conscious that our recommendations should not unduly add to the complexity or cost of appeals.

If we were only concerned with the first function, i.e. the expeditious handling of appeals to settle differences between the parties, we would be inclined to confine our recommendations to the expansion of the Court of Appeal from time to time proportionate to the increasing workload. But an ever growing Court of

Appeal sitting in panels of three (or five on odd occasions) would not effectively perform the law-developing function required of the court of final resort in the province.

An appellate court, which is to impart to the laws of Ontario uniformity, consistency and stability, albeit accompanied by the required degree of flexibility, will best achieve its purpose if it be a comparatively small and integrated body. Its size should be such as to enable its members to work in close and continuing community in the development of the law. The size should be limited so that unity will be achievable and will be apparent and it should remain constant. Since the decision rendered by any panel of such court would be the decision of the court and an authority to be followed in future cases, it should speak as a single tribunal -- the number of judges forming any panel should be a majority of the members of the court. The volume of work directed to it should be limited to enable the court to discharge its function free from the pressure of an unduly heavy case-load and it should have ample time for deliberation and preparation of judgments.

If the law-developing capability of such a court is to be preserved, some other tribunal will be required to cope with the prepondering number of appeals which do not require that consideration be given to questions of general importance.

Many jurisdictions have sought to accomplish this by the creation of a two-tiered system of appellate courts. Principally because the introduction of another level of appeal universally available involves added delay and expenses, we have rejected it.

In our view, the appellate structure which would best serve the needs of Ontario would comprise one appellate court having two sections: one to be oriented to hearing appeals wherein the resolution of the disputes between the litigants does not entail any law-developing pronouncement, the other to be concerned principally with the law-developing function. We refrain from making any recommendation as to the names by which these sections should be known but hereafter we shall refer to them respectively as the "General Section" and the "Juristic Section".

In conformity with the views we have already expressed, we would fix the number of members of the Court of Appeal to be assigned to the Juristic Section at eight which would be the maximum size of that Section; expansion of the Court of Appeal if and as required by the volume of work would take place in the General Section: we believe that a section of 10 members would be adequate at this time but we would expect that its membership would require to be increased inside of three years.

The obvious problem, however, is how to differentiate between individual cases so that each would be brought before the appropriate section.

The monetary amount involved has traditionally been given importance as determining a court's jurisdiction. This is a false standard by which to select appeals involving questions of law whose determination is of lasting public importance. Many such legal issues arise in cases where the money or money value is not great, and many cases where large amounts of money are at stake do not involve questions which are of concern to anyone other than the immediate parties.

At the present time in Ontario, the forum from which certain appeals lie determines the appellate court to which the appeal proceeds. For example, an appeal from the County Court lies to the Court of Appeal but an appeal from the same judge sitting as judge of the Surrogate Court is heard by the Divisional Court. This appears to be an equally false standard; difficult questions of general importance may arise in any court or tribunal.

For the same reason, an attempt to define the distribution of appeals as between two sections by reference to the subject matter of the cause of action would be impractical.

We do not think it is possible to frame legislation or rules of practice that would automatically achieve the kind of segregation we advocate. We think that the only workable procedure for the selection of cases meriting hearing by the Juristic Section would be to provide that access to that Section be solely by leave granted by it. The General Section would be available to hear appeals in which such leave had not been sought or had been sought and refused.

The decisions rendered by the Juristic Section on applications for leave should, within a reasonable time, establish the standards by which the Section would determine the eligibility of an appeal for hearing before it. By this process counsel would find guidance as to the nature of cases in which applications for leave to proceed in the Juristic Section would have a reasonable chance of success.

For the effective discharge of the duties imposed on the General Section that body should have a membership specifically and permanently attached to it. From 1912 to 1923, the members of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario were selected annually from the members of the High Court Division who had been appointed as trial judges. This experience was not a happy one and was abandoned in favour of first, two courts and ultimately a single court composed of justices permanently appointed as appellate judges. In spite of this when the present Divisional Court was established in 1972, it was constituted of members of the High Court of Justice. We feel that, in the composition of an appellate tribunal, permanence of tenure is an element which is essential for its proper performance of that function.

Experienced appellate judges have informed us that a period of as long as 2 to 5 years has elapsed before they felt completely oriented to the task of hearing and deciding appeals. The very size of the High Court of Justice as now constituted makes it difficult, if not impossible, to give every member of that court sufficient exposure to appellate work to afford him anything like this experience. It is largely on account of the lack of permanence in its make-up that the Divisional Court has failed to achieve recognition as an effective appellate court. In the light of the early experience in constituting an appellate court with a periodically rotating membership it is our opinion that, should our recommendations with respect to two appellate divisions be implemented, the members of each of these divisions should be permanently appointed to the respective divisions.

It is the foregoing appellate structure which we recommend. Our detailed recommendations as to the establishment and operations of the two sections are found at the end of this chapter. However, some of the operational features which distinguish our proposal from the usual two-tiered appellate structure will be better understood by considering how we have sought to avoid the features of a two-tiered system of appellate courts to which criticism has been most frequently directed.

Many who have made representation to us assumed that the presence of two appellate sections would mean the introduction of another stage of appeal, resulting in an increase in the cost to the litigant, the opportunity of delay in finality, and the possibility of an advantage to the party able and willing to undertake the expense of another appeal. These objections would be weighty if our proposed structure entailed two stages of appeals successively available at the request of every litigant. However, in our proposal the two sections are designed normally to be alternative fora, each the terminal point for the cases coming before it.

Under the plan we propose an appeal would be launched by a notice of appeal which would be directed to the Court of Appeal; any party to the appeal could forthwith apply to the Juristic Section for leave to proceed in that Section. If leave were refused or not applied for within a specified period, the appeal would proceed to a hearing and determination in the General Section. The decision of the General Section would not be appealable to the Juristic Section and in the vast majority of cases the decision of the General Section would be the terminal point for that cause.

However, as the law developing court, the Juristic Section would have a supervisory role and would be invested with power, exercisable in special circumstances, to review in whole or part a decision of the General Section.

It may seem anomalous to suggest that in a one-tiered appellate structure there could be cases where an application for a further hearing by way of review could be made to one section of the court with respect to an appeal decided by the other section; nevertheless, we have thought that there may be some cases, rare though they may be, where such a right should be available.

It is not necessary to particularize all the kinds of cases which would come within the scope of such a review; one example would be where an important point of law first emerged on the argument before the General Section. Another would be where two panels of the General Section had interpreted the same statute differently: in general terms the Juristic Section should have and exercise such a power whenever the maintenance of consistency and coherence in the law requires its intervention.

The extent to which and the manner in which the supervisory reviewing power would be used would be determined by the Juristic Section. Since this power of review is not to be an appeal in the ordinary sense, and since it is contemplated that there shall be only one final decision in each matter that comes before the Court of Appeal, it would be essential that the reviewing power be exercised before any pronouncement of the General Section be embodied in a formal order of the court, appropriate rules being promulgated to this end. Any changes in the proposed decision of the General Section made on such a review would be incorporated in the order of the Court as finally issued.

It has also been suggested that, if the presence or absence of some law-making element in the issue involved be used as a basis for differentiation as to the appropriate forum of appeal, counsel would face an insurmountable task in predetermining the appellate section to which the appeal should be directed. Our proposal assumes that solicitors and counsel, as responsible officers of the court, will honestly endeavour assist the court in directing each appeal to the appropriate

section, but to avoid the possibility that any litigant might be challenged as being before the wrong section, both sections would be invested with the same jurisdiction.

Another criticism frequently made was that obtaining leave to appeal as a preliminary to an appeal is likely to be time-consuming and unnecessarily costly in that the argument on the application for appeal will likely be repeated on the hearing of the appeal, and that in many cases the appeal could be argued as quickly as the application for leave. We do not believe that such an objection inevitably applies to every procedure for leave to appeal, but we are aware that the possibility creates a problem and that it must be guarded against.

In the procedure we have recommended, access to the Juristic Section may be sought in either of two situations - (1) where the application is made after the appeal is launched and before it has been brought on for hearing before the General Section, (2) where the application seeks the review of a pronouncement of a General Section after the appeal has been heard in that Section.

In the former circumstance all that the court could do is to determine if the appeal is an appropriate one for Juristic Section to hear: it could not deny the right to proceed before the General Section.

When the application is to have the Juristic Section review an appeal already heard by the General Section, it would more nearly resemble what is ordinarily understood by an application for leave, i.e. any further review of the decision of the General Section would be dependent on the success of the application, the unsuccessful party before the General Section being required to accept the decision of the General Section as a judgment of the Court of Appeal unless leave be granted.

The Juristic Section should be left free to develop its own procedure for the granting of leave, whether it be leave to proceed before the Juristic Division in the first instance or leave to review a pronouncement of the General Division. One can readily imagine some applications being strenuously opposed, requiring a court to give serious consideration to the representations made by the opposing parties. At the other end of the scale there will be applications for leave to proceed in the Juristic Section in which the suitability of the appeal for such disposition will be so apparent that no realistic opposition to the application can be offered.

We urge that the procedure be simplified as much as possible and that the material required to be presented to the court be not rigidly specified. While it might be expected that leave applications be heard by three judges, there should be no statutory provisions as the number of judges to constitute a court to grant or refuse leave to proceed or review, nor should there be provisions fixed otherwise than by the court as to whether the court should hear oral argument or whether, in the first instance, such applications could be disposed of on a written application, suitable provision being made for the renewal of the application before the court if a party so requires. The governing consideration should be that no unnecessary hardship or financial burden should be placed on any litigant.

If our recommendations as to the jurisdiction of the Court of Appeal be implemented, the appellate jurisdiction of the Divisional Court would be terminated, our recommendations contemplating that the appeals now directed to it would lie to the Court of Appeal. The remaining jurisdiction of the Divisional Court, that exercisable under The Judicial Review Procedure Act, so closely

resembles that traditionally exercised by the Court of Queen's Bench with respect to the prerogative writs of certiorari, mandamus and prohibition that it would be appropriate to reconsider at this time the necessity for a separate court to perform functions which were long vested in the High Court of Justice as the lineal successor of the Court of Queen's Bench.

In considering the feasibility and structuring of one appellate court having two sections, we developed some rough estimates as to the use of judicial time and its disposition between the two sections. Obviously, the figures which follow are not the statistics of the performance of individual judges but they are drawn from the experiences of judges engaged in appellate work.

The many demands made upon an appellate judge reduce the time he would otherwise have available for hearing and deciding appeals -- preparation before hearing argument, hearing argument in Court, deliberations and writing of written judgment. We have used the following as a typical annual budget for the disposition of the time of an appellate judge.

Allowing 8 weeks for Christmas, Easter and that part of Long Vacation at the disposal of the Justice, there remains allocable to duties associated with the office in days (44 x 5)		220
Chamber work	15	
Meetings of Court, Committees, Task Forces, 1 day per month	10	
Commissions, Seminars, Judicial Conferences, Aggregate for Court 40 - 60 days: per judge	5	
Current Reading: Law Reports, Periodicals, etc. not related to any specific judgment and non-legal topics - 1/2 day per week	22	
Available for Court sittings, preparation for sitting and writing judgments	168	
	220	220

With the addition of the legal officer we have recommended and the creation of the Juristic Section and the General Section members of the Juristic Section would be relieved of much of the Chamber work and could devote to the hearing and disposition of appeals approximately 178 days annually.

The time each judge spends in court is ascertainable from the statistics which are recorded but a summary of that time gives no indication of the unrecorded time devoted to the composition of written judgments. On this account, we have sought to estimate the time required for the preparation of a written judgment of normal difficulty.

Judgment is reserved because (1) the members of the Court are undecided as to the result or (2) the members of the Court, being in agreement as the result, believe the question merits a considered and written statement of the law.

In the former case, before any member of the Court can embark on the writing of a judgment, he must devote time to the resolution of the issues; this will entail a critical examination of the transcript and exhibits and adequate research into the law. In such cases, when the actual preparation of the written judgment begins, the time requirements for step one and two, as hereafter set out, will be reduced on account of the time already spent in the examination of the record. However, the total time spent in preparing such a judgment is likely to be greater than where at the conclusion of the argument, the members of the court are agreed as to the result. It is also likely that other members of a panel sitting on the appeal will spend a greater length of time in forming their own decisions.

The figures following relate to the aggregate time devoted to the production of a judgment by the members of a panel of 3 members. Should a panel consist of 5 members, the total judicial time invested in the judgment of the Court obviously would be somewhat greater.

Step 1 -	Reviewing appeal book transcript, statements of counsel and notes of argument	1/4 to 1/2 day
Step 2 -	Research and consideration of authorities Note: law clerks' time is principally devoted to filling in the failures of counsel to give complete citations of all the cases which are relevant. In any event a judge must read all the relevant cases himself	1 and 1/2 days
Step 3 -	Drafting and dictating	1 day
Step 4 -	Conferences on draft including time of associate judges	1 day
Step 5 -	Perusing and revising drafts including time of associate judges, editorial corrections, etc.	2 days
Step 6 -	Final perusal prior to release, including time of associate judges	1 and 1/2 days

In addition to the number of cases in which a judgment is reserved, there are cases in which a second judge writes a judgment. On this account an allowance of 10 percent is added resulting in a rounded average of seven and a half days.

The resulting figure of 7-1/2 days is subject to wide variations in actual practice depending on the complexity of the subject matter of the case but it gives some indication of the not inconsiderable portion of his time an appellate judge must devote to deliberation and the writing of judgments.

As we consider both of the foregoing estimates to be realistic, we have employed them in making an estimate of the number of appellate judges required to staff the Court of Appeal having a Juristic Section and a General Section and of the allocation of their time.

In 1975, after making an allowance for settlements, 448 civil appeals were argued before the Court of Appeal in 77 of which judgment was reserved, and 585 criminal appeals were heard resulting in 47 reserved judgments. In addition, the Divisional Court heard 100 appeals.

Assuming that a similar number of appeals would be presented in any given year and that leave to appeal were required before any appeal could be brought before the Juristic Section, the volume of appeals on the civil side qualifying for leave would be substantially less than the number formerly heard by the Court of Appeal, enabling the Juristic Section to devote its time to those cases in which there was some substantial question of law of general importance: the proportion of cases in which judgment would be reserved would increase, the actual number likely being very close to or exceeding that which it was in 1975: on the criminal side there would be a more dramatic reduction in the number of appeals in which leave would be granted but there would not be a corresponding reduction in the number of reserved judgments: appeals from convictions for the more serious offences tried in the High Court of Justice call for written judgments more frequently than do criminal appeals from lower courts. A reasonable estimate would be that the Juristic Section would hear annually 90 civil appeals resulting in 48 reserved judgments and 44 criminal appeals resulting in 33 reserved judgments.

During the years 1973-1975, the average time devoted by the Court of Appeal to hearing an appeal was: civil -- 1.75 hours and criminal -- 1.3 hours; if only cases in which leave had been granted were heard the average time might be expected to increase to: civil -- 2.5 hours, criminal -- 1.5 hours.

Past experience indicates that the time spent by a judge in preparation for the argument of an appeal in court is equal to the time in court hearing argument and that the time spent in preparation for the hearing of an application for leave is, on the average, greater than the time spent in court hearing the application. On this basis none of the days on which a judge sits in court may be counted as available for any other activity save preparation: and the greater time required for the preparation for hearing applications for leave must be taken into account.

It is reasonable to assume that the administrative duties of the Chief Justice of Ontario will take up at least 50% of his time thus reducing the time he will have available for hearing and deciding appeals.

In the light of the foregoing, we made the following estimate of the distribution of the time of a court composed of the Chief Justice of Ontario and seventeen other Judges of whom the Chief Justice of Ontario and seven other Judges would be assigned to the Juristic Section.

Juristic Section

			Judge Days
Days per Judge available for in-court hearings and writing judgments as above	168		
relief from chamber work, etc.	10		
	178	x 7.5 = 1335	
90 civil appeals each engaging 5 Judges 2.5 hours			281.
44 criminal appeals each engaging 5 Judges 1.5 hours			83.

applications for leave:

civil - 146 each engaging 3 Judges for .75 hours	82.
additional time for preparation	41.
criminal - 117 each engaging 3 Judges for .5 hours	44.
additional time for preparation	22.
101 Judgments at 7.5 days	757.
	1310.

General Section

	Judge Days
Time required for hearing argument:	
358 civil appeals now heard by Court of Appeal each engaging 3 Judges 1.625 hours	436.
541 criminal appeals now heard by Court of Appeal each engaging 3 Judges 1.1 hours	446.
100 civil appeals now heard by Divisional Court each engaging 3 Judges 1.625 hours	122.
Time required for writing judgments 75 at 7.5 day	562.
	1566.

Number of Judges required $\frac{1566}{168}$ = 9.32 rounded to 10.

Despite our best effort to approach accuracy, we are fully aware that these are estimates only and that there is no way of telling in advance the exact dimensions of the demands which would be made upon each of the two sections. But the Court of Appeal, as we have conceived it, will have the ability to allocate its own resources as the needs of the litigants require and we are confident that it will do so to the end the litigants will have the benefit of the most effective use of the capabilities of every member of the court.

We therefore recommend:

1. That the jurisdiction now vested in the Court of Appeal and the appellate jurisdiction now vested in the Divisional Court, be conferred on and exercised only by the Court of Appeal constituted in accordance with the following recommendations:

2. That, subject to temporary provisions to prevail during the transitional period, the Court of Appeal be composed of two sections:

(a) One expeditiously to hear and dispose of appeals in which there is presented for resolution no question of law of on-going public importance, herein referred to as the General Section;

(b) One to hear appeals involving questions of law, the decisions upon which will be of importance to the public generally or some segment of the public, as on-going expositions of the law, and to exercise a supervisory review power, herein referred to as the Juristic Section.

3. (a) That the Juristic Section consist of:

(i) The Chief Justice of Ontario;

(ii) The Associate Chief Justice (Juristic Section);

(iii) Six other members of the Court of Appeal each of whom shall be assigned permanently to be a member of the Juristic Section.

(b) That the General Section consist of the Associate Chief Justice (General Section) and all other members of the Court of Appeal.

4. That assignments to the Juristic Section to fill vacancies occurring in its membership be made by the Chief Justice of Ontario in consultation with the members for the time being of the Juristic Section: that members of the Juristic Section shall continue to be eligible to sit as members of the General Section and will be expected to do so as the need may arise.

5. That for the effective performance of the primary function of the Juristic Section the members thereof be, and continue in the future to be limited to eight included in which number shall be the Chief Justice of Ontario.

6. That there be no limit on the number of members of the Court of Appeal, the number to be subject to additions from time to time in order that there be no delay occasioned to litigants due to the unavailability of a panel of the court; on the basis of the present volume of appeals its membership should be eighteen.

7. To the end that each of the two Sections normally be the terminal point of each appeal heard by it, and to avoid the two Sections being successive stages of appeal invocable at the instance of litigants, whereas an appeal to the General Section shall be as of right, an appeal to the Juristic Section shall proceed solely with leave of that Section.

8. That since there is but one Court of Appeal both Sections shall be invested with the identical jurisdiction and each shall be empowered to give judgment upon any appeal which comes before it.

9. That a Notice of Appeal shall be effective to bring an appeal on for hearing:

(i) before the General Section if no application for leave to proceed in the Juristic Section be made within a specified number of days or an application for leave to proceed in the Juristic Section shall have been refused;

(ii) before the Juristic Section if a leave therefor be granted

upon the application of any party to the appeal, brought within a specified number of days of the filing of the Notice of Appeal.

10. That the Juristic Section be empowered, to review and revise, if it so elects, a decision pronounced by the General Section on any proceeding before it:

(a) On the application of a party thereto; or

(b) At the request of the General Section made with the concurrence of the parties thereto.

11. That the decision of the Juristic Section on such review be the judgment of the Court of Appeal on such appeal.

12. That the present appellate jurisdiction of the Divisional Court be terminated.

Chapter 7

Criminal Appeals

For many years appeals to the Court of Appeal in criminal matters have been heard by a panel of the Judges assigned for a short fixed period not longer than one month to hear exclusively criminal appeals. From time to time suggestions have been made that a separate court should be created, the members of which would be permanently appointed to it and would devote their time exclusively to hearing criminal appeals.

To date no attempt has been made to set up a separate criminal court, either by the lifetime appointment of judges to that court or by the assignment on a comparatively long term basis of selected members of the Court of Appeal. It is obvious that the latter alternative would be , in reality, merely an enlargement of the Court of Appeal and would not bring into existence the law-developing court we envisage as necessary in Ontario.

Many lawyers answering our questionnaire appear to favour the segregation of criminal appeals. However, support for this is not by any means universal -- the members of the Criminal Lawyers Association Committee have expressed preference for the prevailing practice whereby every judge of the Court of Appeal from time to time sits on one of the panels hearing criminal appeals.

One of the reasons advanced in support of a separate criminal court is that it would reduce the workload of the Court of Appeal sufficiently to enable that Court, as at present constituted, to cope with all civil appeals.

Before examining the relative merits of a separate court of criminal appeal, we considered whether the hearing of criminal appeals by a separate court would be effective to restore the capacity of the Court of Appeal to meet the demands made upon it by civil appeals alone.

The removal of all criminal appeals to a newy constituted criminal appeal court leaving the present court of 14 judges to deal exclusively with civil appeals undeniably would give immediate relief to the continuing Court of Appeal but it would not, of itself, be a remedy which would prevent the recurrence of overloading; it would be but postponing the day when some more durable adjustment would have to be made. Long before the end of the 25 years which we accepted as the period of possible durability for any plan which we propose, the plight of the Court of Appeal restricted to the hearing of civil appeals, would again demand that steps be taken to reduce the burden upon it, and there would again arise, with respect to civil appeals, the central choice which now confronts us - should the size of one appeal unit be progressively increased or should the number of judges required to hear all the appeals presented be distributed between two divisions or sections.

If we were to offer such a comparatively temporary solution as the removal of criminal appeals, we would consider that we we had not fulfilled the purpose we set out to accomplish - to ensure an appellate system capable of being adapted to the needs of the people of Ontario until the end of the present century.

We next considered the feasibility of introducing in criminal appeals a leave procedure such as is in use in England. Our observations lead us to believe that, in England, the Criminal Appeal Division of the Court of Appeal keeps to a manageable size the volume of appeals actually argued in court by requiring, that leave to appeal be obtained in all but appeals involving a question of law alone; such applications for leave are made in writing each of which is read by a judge of the Queen's Bench Division who, without hearing counsel, grants or refuses leave as the case may be. 4,500 out of 6,500 applications for leave are disposed of annually in this way. Thus only a small percentage of the appeals launched are actually heard.

At one time the hearings of applications for leave to appeal in criminal appeal were dealt with in Ontario in a manner which separated the application for leave from the argument of the appeal; the transition to contemporaneous hearing of the application for leave and the appeal, if leave be granted, seems to have occurred without any change in the rules or any direction from the court which is now identifiable.

Unless section 615 of the Criminal Code requires otherwise, a leave procedure similar to that of the English practice could be adopted in Ontario.

Section 615* entitles an appellant, who is in custody, to be present at the hearing of his appeal, (i) if he be unrepresented by counsel or (ii) if he be represented by counsel on an appeal for which leave is requisite and leave has been granted. Subsection 2 of that section appears to deny the appellant the right to be present on an application for leave to appeal.

Some doubt has been cast upon the meaning of this section by the Supreme Court of Canada in its decision rendered in Smith vs. The Queen, (1966) 1 C.C.C. p. 162, 47 C.R. 1. Since that decision, the Court of Appeal has consistently refused to dispose of any application for leave to appeal in the absence of an appellant who is in custody, who has demanded to be present and who is not represented by counsel. That decision thus appears to be an obstacle to the introduction of a leave procedure similar to the English one in that the demand of an appellant to appear in person and argue the application for leave would prevent the Courts acting on a written application.

It is unfortunate that Parliament has not clarified its intention in this regard by legislative action. If Parliament intends that every applicant for leave to appeal who is in custody can, on demand, require the penal or correctional authorities to convey him to the scene of the hearing of the application, the court must not dispose of the application unless the applicant be before the court. If, however, that be not Parliament's intention it is obvious that with the increase in the number of applications, the courts of Ontario must progressively avail themselves of every opportunity to restrict the unproductive use of judicial time; one such method would be to move by progressive stages to disposal of applications for leave to appeal under the Criminal Code upon the written application by, or on behalf of, the applicant without the personal appearance of the applicant or his solicitor.

In looking at courts in other jurisdictions we found that only in three American states are there separate courts dealing solely with criminal appeals. In one of these states, Texas, a constitutional amendment now in process, when

*See Appendix D for text of S.615.

adopted, will eliminate from the appellate structure the state court of criminal appeals. In two other states, Tennessee and Oklahoma, separate courts are in operation and there is at the present time no move to dispose of them. In none of the remaining states in the United States is there apparent any move to create a separate court of criminal appeals.

The situation in England is somewhat anomalous. The right to appeal from conviction or sentence in indictable offences was introduced in 1907. At the same time there was constituted a Court of Criminal Appeal. The members of that Court were originally the Lord Chief Justice of England and eight judges of the Queen's Bench. Later all the judges of the Queen's Bench Division were made eligible to sit as the judges of that court.

Due to a growing feeling that the Court of Criminal Appeals lacked the status of a "real" Court of Appeal, following the recommendation made in the report of the Inter-departmental Committee on the Court of Criminal Appeal, 1965 (The Donovan Report), the Court of Criminal Appeal was abolished and its jurisdiction transferred to the Criminal Appeal Division of the Court of Appeal. Despite this, the make-up of the court hearing criminal appeals has remained much the same. On each panel of the Criminal Division of the Court of Appeal there sit either two Lords Justice of Appeal and one member of the Queen's Bench Division or one Lord Justice of Appeal and two members of the Queen's Bench Division. The picture now presented in England is neither that of a separate court of criminal appeal nor of a comprehensive court of appeal exercising both civil and criminal jurisdiction.

Behind some of the support for a separate court of criminal appeals lies a faith in the efficacy of judicial specialization. There is much to be said for the administrative disposition of appellate experience so that counsel facing a panel of a general appeal court may have the assurance that the panel contains one judge who has an extensive acquaintance with the subject matter involved. But restricting the experience of the members of an appellate court to that gained in criminal appeals, while it might enable the judges to proceed more expeditiously, and might enable the court to formulate and follow more consistently a policy in relation to criminal matters, would be accompanied by counter-balancing disadvantages. Confining the work of an appellate judge to criminal matters would have a narrowing effect on the breadth of his perceptions and reactions and would, within a comparatively short period of time, denude the court of the humanizing experience which comes from exposure to matters in which various relationships of litigants to each other are brought before the court. If there be any field in which a judge requires a comprehensive awareness of the whole spectrum of society it is the criminal one.

The views which have been expressed by the Donovan Committee in its report, speaking with respect to this subject, commend themselves to us:

> "It would be asking too much of any judge and against public interest, that he should be required to deal with nothing but criminal work for longer than a year at the most. --- It would be impractical and unwise to have the same judge hearing nothing but appeals and applications in the criminal cases for the whole of his judicial life."

The almost total lack of precedent and the limited experience to be gathered from the operation of separate criminal courts elsewhere impels us to refrain from recommending that, mandatorily, by statute, a court to hear

exclusively criminal appeals should be constituted.

Within the present structure of the Court of Appeal, which we are recommending there is ample scope, by administrative direction of the Chief Justice of Ontario, for channelling all criminal appeals and applications for leave to appeal to a group of judges selected, with their own approval, to be for any period specified the only members of the court to hear such matters.

After a reasonable period of experiment it should be possible to determine whether the segregation of criminal matters thus accomplished has been beneficial to the administration of criminal justice. If so, the success of the experiment would afford grounds for solidifying the procedure by amendments to the Judicature Act and the Criminal Code. Conversely, if the results of the experiment were such that they would not justify its incorporation into the permanent structure of the appellate system, no legislative actions would be necessary to restore the 'status quo ante'.

If our recommendations as to the division of civil appeals between two sections of the Court of Appeal be implemented, there would be no obstacle to criminal appeals being accommodated similarly. Each appellant or applicant for leave would have access as of right to the General Section or could, where he considered that the issues involved would be of sufficient public importance to command the attention of the Juristic Section, apply to that Section to have the appeal heard therein.

The General Section probably would hear the majority of conviction appeals and practically all sentence appeals, and would lend itself to the segregation, on the experimental basis we have described, of a group of judges to hear exclusively criminal appeals.

We therefore recommend:

1. That the appellate jurisdiction conferred by the Criminal Code on the Court of Appeal continue to be exercised by the Court of Appeal constituted as we have recommended.

2. That only those criminal appeals with respect to which the Juristic Section has granted leave to appeal, be heard and disposed of by it.

3. That all other criminal appeals be heard and disposed of by the General Section.

Chapter 8

Transitional Provisions

If our recommendations as to the creation of a Juristic Section and a General Section are to be implemented, there are substantial reasons why the new format should not be made immediately operable. We realize that special provisions must govern the transitional period and that in forming them certain circumstances must be accommodated, i.e. -

1. There will be 14 members of the present Court of Appeal (each of whom will be referred to as a continuing judge).

2. Approximately 600 appeals will have been filed and remain unheard, the majority of them awaiting delivery of transcript, appeal books, etc.; the parties to each of these appeals must be afforded a reasonable time within which to make an election as to whether an application for leave to appeal to the Juristic Section will be made, or the appeal shall be heard by the General Section.

3. The Chief Justice of Ontario will be the head of the Juristic Section but his duties as such, along with the duties which would be imposed upon him if the proposals of the White Paper* be implemented, will seriously restrict his ability to sit in court and engage in the writing of judgments; hence, a working president of the Juristic Section, preferably an Associate Chief Justice will be required to direct the work of that Court on a day to day basis.

4. If the General Section is to be given the benefit of informed leadership, the head of that Section will, of necessity, be drawn from the "continuing judges".

5. The number of members of the Court of Appeal having two Sections will be increased probably to 18 requiring the immediate appointment of 4 additional judges, none of whom will come into office with any appellate experience.

Different schemes could be evolved for the transition period. We provided two, but in so doing, we do not propose to make a definitive recommendation as to how the transition should be accomplished. We do recommend, however, that before legislation giving affect to any specific scheme is adopted, consultation be sought with the Chief Justice of Ontario to settle upon a plan which will be least disruptive to the operation of the Court of Appeal.

Scheme I

A. During the transitional period, the Chief Justice of Ontario shall from time to time assign six of the Continuing Judges along with himself and the Associate Chief Justice (Juristic Section) to constitute the Juristic Section; preferably periods of assignment to the Juristic Section will not be uniform but will be so arranged that the continuity within the Section will be assured, e.g., by staggering the expiry dates of the appointments.

*White Paper on Courts Administration, October, 1976.

B. The practice of making temporary assignments to the Juristic Section will continue until the number of Continuing Judges has been reduced to six whereupon those six Continuing Judges will be permanently assigned to the Juristic Section. Thereafter assignments to the Juristic Section will be made only when a judge assigned to it has died, retired or resigned.

C. The Continuing Judges not assigned to the Juristic Section will be available to assist the General Section by lending their experience to, and furthering the indoctrination as appellate judges of, the members of the General Section.

D. All judges appointed to the Court of Appeal after the effective date will be members of the General Section unless and until assigned permanently to the Juristic Section.

Scheme II

A. At the effective date, the Chief Justice of Ontario, in consultation with the Continuing Judges will assign six Continuing Judges to be permanent members of the Juristic Section.

B. Whenever a vacancy occurs in the Juristic Section, the Chief Justice in consultation with the Continuing Judges will assign one of the Continuing Judges to fill such vacancy so long as a Continuing Judge is available.

C. Continuing Judges not assigned to the Juristic Section will be available to sit as members of the General Section in order to lend to it their experience and to assist in its indoctrination as an appellate court.

D. All judges appointed to the Court of Appeal after the effective date will be members of the General Section unless and until assigned, permanently, to the Juristic Section.

Chapter 9

Use and Disposition of Judicial Time

As we have already pointed out (Chapter 6) a judge of an appellate court in Ontario has demands on his time beyond what is required for the hearing of appeals in court and writing of reserved judgments.

Our analysis of these requirements furnishes information related to two areas which have attracted our attention. First, the critical examination of the activities which engage the time of an appellate judge, with a view to relieving the judge of those activities which are time-consuming but are not an integral part of his judicial duties. Second, the maintenance of some relationship between the volume of cases required to be heard by any court and the aggregate of the judicial time available for such purpose.

Even a cursory examination of what an appellate judge is required to do points out the fact that, because there is attached to the court no legal officer qualified to deal with such matters, a substantial amount of the judges' time is taken up by matters which do not require the attention of a judge. For example, the appellate judges who are assigned in rotation as chamber judges could be relieved of much, if not all, of the chamber work by the appointment of a legally trained judicial officer whose status would be that of a master. He would be of necessity a practitioner of some seniority and would preferably have some experience in appellate matters. As well as releasing a fair amount of judicial time for the performance of the essential work of the appellate judges, his presence would assure greater consistency and more constant availability. Elsewhere we enlarge upon some of the matters in which such an officer could assist the court, but refer to him here only to indicate the manner in which his presence would reduce the demands on judicial time.

Another activity which is not an essential part of the judicial function is that resulting from the appointment of judges as Royal Commissioners. The presence of judges on Royal Commissions, however undesirable from the point of view of the courts, is a matter of policy beyond our terms of reference, and their appointment as such is the responsibility of the executive branch of government. We do not, however, consider it improper for us to make these comments as to the deleterious effect that such appointments may have on the administration of justice.

Even if it be granted that it is desirable to give to a public inquiry the aura of impartiality and objectivity which the presence of a judge assures, it must be remembered that in some enquiries, by the very nature of his terms of reference, a judge may be exposed to unwarranted criticism reflecting unfavourably on the image of the court and lessening the public appreciation of the judiciary.

Even where, due to the nature of the inquiry, there is absent the risk of lessening respect for the courts, such appointments result in a reduction of judicial time available for the performance of what are the essential duties of the office. Such loss of time can only have one of two effects: either the other members of the court must share the work which would ordinarily have been done by the judge

appointed as commissioner; or fewer appeals will be heard and disposed of during the time in which the commissioner is engaged in his investigation and report. If the reasons for appointing judges as commissioners outweigh the disadvantages, it must be realized that judges do not represent a pool of uncommitted and unused time which can be devoted to the work of commissions without having a very disturbing effect on the administration of justice.

We consider that no member of the Juristic Section should ever be expected to act in a non-curial investigation. If, as we recommend, the size of that body is to be restricted, it would be inconsistent with the limitation of its size to increase the number of judges to allow the use of them as Royal Commissioners. On this account, and because of the desirability of promoting the collegiality of the Juristic Section we believe that it is against the interest of the courts and the public generally that the time of members of the Juristic Section should ever be devoted to the work of Royal Commissions.

All that has been said with respect to the disposition of the time of an appellate judge applies with greater force to the Chief Justice of Ontario, but with respect to the holder of that office there are additional considerations. As well as being Chief Justice of Ontario, the incumbent sits as a judge of the Court of Appeal and directs its work. He is, by statute, the alternative Lieutenant-Governor of the Province of Ontario and must act in that capacity whenever the Lieutenant-Governor is absent or whenever there is a vacancy in the office of Lieutenant-Governor. This is not a nominal office but is one which requires substantial amounts of his time. He is ex-officio a member of the Canadian Judicial Council and must attend its meetings at the call of the Chief Justice of Canada. This body is assuming increasing importance with corresponding demands on the time of its members. The Chief Justice of Ontario must also attend the annual conferences of Chief Justices which entails usually a complete week of absence from the city. The Chief Justice of Ontario is also a member of the Ontario Judicial Council, a body the work of which does not receive much public attention, but which again represents a considerable draw on his time.

If the Ontario Judicial Council is reconstituted according to the terms proposed in the recently released White Paper*, he will become the "chairman of the body" responsible for the administration of all courts of Ontario. Despite the advantages of having the body responsible for the administration of the courts led by the Chief Justice of Ontario, we are concerned that the unintended and indirect result will be that the first judicial officer of the Province will cease to be such save in name, and that the imposition on him of the major responsibility for the administration of the courts will seriously detract from his usefulness as the judicial leader of Ontario.

There are many demands on the Chief Justice to engage in public activities or to give addresses to public bodies. While these are not necessarily part of the assigned duties of the Chief Justice, it is very desirable that he devote time to them if only that there should not, by his isolation, grow up a feeling that the courts are divorced from the people. The impact of this phase of the Chief Justice's duty may be intangible, but it is real.

The administration of a court of 50 members and one which has been growing rapidly over the past few years entails duties which are substantial, varied and time-consuming: while these could be reduced by the addition of staff to the

*White Paper on Courts Administration, October, 1976.

office of the Chief Justice, little or no attention to date has been paid to furnishing him with a staff which would relieve him of some of the personal load which he has to carry.

Despite all of the foregoing demands, it is essential that the Chief Justice of Ontario sit as a member of the highest court of last resort in the Province and participate in its law-developing function. It would be unrealistic at the present time to expect any Chief Justice to spend in Court and in writing judgments the same number of hours as is normally spent by each of the other members of the court, but it is imperative that the Chief Justice of Ontario be able to participate as frequently as possible, and sufficiently frequently that his absence from the court does not become noticeable; and, it is equally desirable that he be the author of the opinion of the court as frequently as any other member of the court.

Elsewhere, we deal with the subject of professional administration: If our recommendations are implemented, there would be taken off the shoulders of the Chief Justice all the duties which can be performed by one who is not a judge. However, even in the remainder of duties devolving upon him, he will still have to bear the double burden of the Chief Justice of Ontario and the head of the Court of Appeal, duties which are different in nature but are both onerous.

The Chief Justice can be and should be relieved of some of the direction of the operations of the Court of which he is the presiding officer, by the creation of the office of Associate Chief Justice and the transfer to that office of the responsibility for the day to day direction of the operation of the Court.

The Judicature Act provides that, in the absence of the Chief Justice of Ontario, his duties be performed by the senior Justice of Appeal. No doubt this provision was inserted in the Act to ensure that there would be continuity in the office of Chief Justice in the event of the incumbent being unable to perform his duties. But, as the Act is drawn, the activities of the senior Justice of Appeal are only provided for when the Chief Justice is absent.

Should this recommendation be implemented the reference in the Judicature Act to the Senior Justice of Appeal should be deleted and the Associate Chief Justice be empowered to perform the duties now empowered on the senior justices of appeal. Our conclusion as to the necessity for an Associate Chief Justice was made before the release of the White Paper. If its proposals are to be implemented the need for an Associate Chief Justice will be increased. Unless such provision is made the Supreme Court of Ontario will be virtually robbed of judicial leadership.

We therefore recommend:

1. That there be appointed to the staff of the Supreme Court of Ontario, for the assistance of the Court of Appeal exclusively, a qualified and experienced barrister to have the status of a master to whom shall be delegated such duties as shall relieve the judges of the Court of Appeal from encroachment on their time by matter not requiring the attention of a judge, e.g. motion for adjournments, or enlargement of time, application for security for costs and staying of execution;

2. That with the approval of the members of the Court of Appeal, Rules of Practice be promulgated to define the matters which such legal officer is empowered and required to dispose of;

3. That to lessen the administrative duties of the Chief Justice of Ontario, each of the Juristic Section and the General Section be provided with an Associate Chief Justice;

4. That no member of the Juristic Section accede to any request to perform duties beyond the scope of his judicial responsibilities unless the approval of all members of the Juristic Section be given;

5. That no member of the General Section be asked to accept an appointment requiring the performance of duties beyond the scope of his judicial responsibilities unless adequate provision shall have been made for the performance, during the time in which he is engaged on such non-judicial duties, of the judicial duties which otherwise would have been performed by him.

Chapter 10

Law Clerks

We have already expressed our vigorous opposition to any attempt to relieve the workload of appellate judges by allowing any part of the decision-making process to be performed other than by a judge. On the other hand we have stated with equal force that judges must not be unnecessarily engaged in activities which do not require their special abilities and qualifications. We believe that the use of law clerks for the assistance of appellate judges is consistent with both the foregoing convictions.

As the term is used in Ontario, a law clerk is the graduate of a law school recently admitted to practice, who, for one year is attached to the court as a research assistant to the judges.

For over a decade in Ontario the presence of law clerks has been recognized and experience has proven that they can, without any encroachment on judicial territory, provide assistance to the judges, largely in the area of legal research, which enables the judges to devote more time and attention to their essential role of decision-making and law development.

Originally the only law clerk available to the Court of Appeal was the one assigned to the Chief Justice of Ontario; over the years the number has been progressively increased until in the year 1976/77 four law clerks are allocated to the Court of Appeal.

In many other jurisdictions, law clerks are provided to judges on a one-to-one basis, and some judges have the assistance of two law clerks. In Ontario we have never come near to that standard.

As the incumbent enjoys some of the benefits of a postgraduate student, the appointment has attraction for younger lawyers who intend to make a career in litigation, and the present professional status of those who have been law clerks bespeaks the quality of law clerks who have been associated with the court in the past.

Several factors have tended to lessen the effectiveness of law clerks as assistants to the judges. First, the number has always been less than the number of judges, necessitating the allocation of the time of each law clerk amongst the judges. Thus the service of a law clerk is not always available when it is most needed. Second, in the past substantial amounts of time of the law clerks attached to the Court of Appeal, has been taken up in the preparation of the "blue sheets" (Chapter 18). Third, the one year period of service enforces annually a period of familiarization during which the new appointees must learn their role and during which their effectiveness as assistants to the judges is not at its maximum.

In recent years some improvement has been achieved by arranging some overlapping of the terms of retiring and incoming law clerks. Despite this practice, judicial time must be expended every year in breaking in the new law clerks.

The number of law clerks required is a matter for continual assessment by the court and cannot be made by an outside body such as this Committee. We

can say, however, that the failure to appoint a sufficient number of law clerks brings about a misuse of judicial time, results in inefficiency and has the effect of slowing the judicial process. The number of law clerks to be appointed from time to time should conform with the need for their services as expressed by the Chief Justice of Ontario. Without encroaching on what we consider should be his sphere, in the plan which we have recommended we foresee that each member of the Juristic Section would require the full-time service of one law clerk and that a number of law clerks, probably less than the number of judges, should be provided for the General Section.

In order to attain the most effective distribution of the time of the law clerks and to remove from the judges the task of training them, there should be provided a full-time research director who would exercise a measure of supervision over the law clerks: the holder of this post should be a career researcher who would develop the research resources of the court, including its library, and guide and direct the law clerks to the end that the most effective use may be made of their time. As the number of law clerks increases it will be progressively more desirable that there be some permanent framework into which the appointees can be assimilated rapidly to ensure the most effective use of their time and the greatest benefit to the judges.

We therefore recommend:

1. That law clerks continue to be made available to the members of the Court of Appeal and that the number be increased from time to time as required by the Chief Justice of Ontario.

2. That there be attached to the Supreme Court of Ontario a full-time qualified director of research whose duties would include the co-ordination of the work of the law clerks.

Chapter 11

Oral or Written Argument

Many lawyers advocated the adoption of stringent time limits on oral argument or the substitution for it of written argument, as a means of conserving the time of the appellate courts and enabling them to dispose of appeals more rapidly. Most of these suggestions seem to have been inspired by the prevailing practices in appellate courts in the United States which have adopted this procedure to meet the pressure of increasing workloads.

When evaluating time limits on oral argument as a manner of conserving judicial time, what must be kept in mind is that, if a court is not prepared to hear all that counsel wishes to advance orally in support of his principal's cause, it must be prepared to let him present in written form what he wishes to put before the court.

On this account the savings of judicial time claimed for written argument are illusory. If every member of a multiple-judge court is to familiarize himself with the written material submitted by counsel as a prelude to hearing curtailed oral argument, it is a fair estimate that the judicial time thus involved will seldom be less than would have been engaged had full oral argument been given in open court. Any real saving that is effected is the result of other devices, to which reference will be made later, which enable some or all of the members of any court to reduce the time which judges otherwise would have spent in reading the material submitted.

So far as counsel is concerned, the writing of a written brief or argument is in itself time-consuming and it may engage the time of the counsel in setting down and writing lengthy arguments on points the court is prepared to accept. Further, when counsel had been made aware of the time the court is prepared to accord to him for the presentation of oral argument, it is extremely difficult to prevent counsel making use of all that time. More than likely the result is that the maximum time allowance becomes the minimum time consumed.

Moreover, the time fixed by arbitrary limits is likely to be either too long or too short. The measure of time for the argument of any case is the time required for its proper presentation. An experienced presiding judge is able to avoid unnecessary encroachment on the time of his court, at the same time allowing ample opportunity to counsel to develop any argument he wishes to present to the court or the court wishes to hear.

It is true that the formulation of the precise grounds of appeal in the written brief makes it possible in many cases to eliminate much of the evidence both oral and documentary which has come before the trial judge, but which is not relevant to the question which forms the subject matter of the appeal, with a resulting saving of judicial time. But we believe that our recommendation that the Notice of Appeal contain a more detailed statement of the grounds of appeal will accomplish a similar saving of time without the accompanying disadavantages of written argument.

Even if we were convinced that significant reduction in the use of judicial time would result from the restriction of oral argument, we would be of the

opinion that unrestricted oral argument has advantages which merit its retention.

Whatever be the preliminaries to a hearing of an appeal, the nub of the appeal in Ontario is the face-to-face confrontation, in court, of capable and prepared counsel and an informed court. Every point in a party's case is explored in the process of the discussion between counsel and the members of the court, and can be pursued until the court understands counsel's presentation and counsel is assured that the court understands his argument. Oral argument affords each member of the court the benefit of hearing the questions put to counsel by other members of the court and of weighing the answers of counsel so that the court as a whole develops an overall view of the issues more comprehensive than that of any one member of the court.

Above all, the opportunity to present oral argument assures counsel that every member of the court has become aware of the submissions made by, or on behalf of, the client. Even when the court rejects his argument, counsel can faithfully inform the litigant that every member of the court sitting in judgment on his case has heard in its entirety what was presented on his behalf.

Economy in the use of the time of an appellate court requires the court to have the benefit of argument from capable and prepared counsel. This appears more likely to be achieved where the counsel appearing on an appeal is one who has chosen advocacy as a career and has accumulated some experience in that field.

In Ontario a lawyer may present himself to argue an appeal despite the fact he has never held a junior brief or in fact has never appeared in any court previously.

We appreciate that no rule of court can insist on proven experience as a passport to appearing in the courts. The right of audience accorded to the members of the Law Society of Upper Canada is jealously guarded as it should be.

But the unnecessary burden thrown on the appellate courts by the appearances before them of inexperienced counsel requires that serious consideration be given to establishing some standards to be met by lawyers seeking to represent their clients in a sophisticated and demanding arena such as the Court of Appeal.

The whole field of specialization in the practice of law is currently receiving attention. While not making any recommendations, we would commend to the Benchers of the Law Society that an obvious field of specialization is advocacy in the courts and that the insistance on some minimum requirements of specialized training and experience in this field would not only be in the interest of the court but of the litigants; it would not be an unjustifiable requirement to exact from one who held himself out to be specially qualified in this area.

In the busier American courts, the protection of the judges from the overwhelming flow of paper has made necessary the adoption of various devices to intercept or divert, on its way to the judge, the argument prepared by counsel. Law clerks and staff attorneys not infrequently read the briefs and prepare summaries thereof for the use of the judges. Even when such summaries are strictly factual and do not embody opinions of the authors, they may keep from the judge the precise form of the submissions which counsel has prepared because the

attorney considered them to be persuasive. In an appellate court where such assistance is available, it is unlikely that every judge has himself read every part of the counsels' briefs: if it be possible that this occur, it is impossible for the litigant to be certain that every judge who participates in the judgment has become personally aware of every word that counsel has prepared for the purpose of persuading the court to support the litigant's cause. This alone is a compelling reason for placing no predetermined restrictions on the length of counsel's oral argument.

We therefore recommend:

1. That appeals continue to be presented to the Court of Appeal by oral argument.

2. There be no fixed or arbitrary limits on the time permissible for argument by counsel.

Chapter 12

Venue

We have been made aware that there is a very strong opposition to the hearing of all appeals in Toronto. Akin to this, is a feeling that in appellate matters solicitors in local centres should be able to deal with the office of the nearest local registrar and not have to deal with the appellate court office through a Toronto agent.

Although these two views bear some relation to each other they require separate consideration.

At the present time, the Rules of Practice make provision for the sitting of the Divisional Court in London, Ottawa, Sudbury, Sault Ste. Marie and Thunder Bay. The Divisional Court has held itself in readiness to travel and has on several occasions sat outside of Toronto but it does appear that, up to the present time, local solicitors have not taken full advantage of the opportunities so afforded, and a preponderance of the sittings of the Divisional Court have taken place in Toronto. In at least one of the cities mentioned, the views of the members of the local bar are divided, some preferring to retain Toronto counsel for their clients' appeals and some wishing to appear personally to represent their clients.

However, there is a growing consensus in the legal profession that appeals should be heard locally. With the passage of time and the increase in the number of appeals involving local residents, there will be more reason to recognize the wish of solicitors that they not be required to come to Toronto for every appeal. As a consequence, the assumption that Toronto should be exclusively the venue for the hearing of appeal needs to be reconsidered.

If, as we have recommended, there are to be two sections of the Court of Appeal, the General Section being one to which every litigant has access as of right, we are of the view that this Section should sit in such places in Ontario as would make access to it more readily available to solicitors outside of Toronto. Obviously, in Northern Ontario, for some considerable time it would be unreasonable to have the court sit other than in cities such as Thunder Bay, Sault Ste. Marie, Sudbury and North Bay. However, in the more populous areas of Ontario, there should be sittings of the General Section, not necessarily in every county and district, but in such centres as would bring the sittings of that court within a reasonable travelling distance of every county and district town. Necessarily, the rules would have to provide considerable flexibility, as Rule 497 now does, for the transfer to Toronto or other centres if litigants would be prejudiced by waiting for a sitting of the court in any particular centre.

If, there is to be a Juristic Section the primary function of which is the development of the jurisprudence of the Province, it should sit only in Osgoode Hall where the counsel appearing before it could have immediate access at the time of the hearing of the appeal to the facilities of the Great Library. Nowhere else in Ontario, save possibly in the libraries of the law schools, is there readily available such a comprehensive collection of legal authorities: it would be unreasonable to expect counsel or the Court to sacrifice the physical presence of such essential material by holding sittings outside Toronto.

Since the province has assumed the financial support of the administration of justice, and the counties and districts have been relieved of this expense, there is no sound reason why the office of the Registrar of the Supreme Court, including the offices of the Local Registrars, should not be considered to be one business complex, any branch of which may be used as the contact point with the Court for every appellate matter. With modern techniques of facsimile transmission, it should be possible that the text of any document regarding a proceeding in the Supreme Court, filed in any office of that court anywhere in Ontario, be immediately available in any other office. It has been brought to our attention that the State of Florida has already adopted rules for filing by facsimile transmission.

We foresee that in the very near future all court offices in Ontario will be effectively linked with electronic equipment so that there can be constant communication among them. We do not feel that it lies within the scope of our terms of reference to study and report upon how this would be accomplished, but we have made sufficient inquiries to satisfy ourselves that it is not beyond the capabilities of present expertise to evolve mechanisms to make possible what we have suggested.

We have confidence that the administrative structure outlined in the White Paper is directed to the escalation of the operational capacities of the Courts to a level of efficiency expected of offices in the private sector. On this assumption there would be no obstacle to the decentralization of appellate court business.

We therefore recommend:

1. That the Juristic Section sit only in Toronto.

2. That the General Section be authorized to sit in any place in Ontario.

3. That the Rules of Practice and the Criminal Appeal Rules provide that, in appellate matters, any document may be filed in any local office of the Supreme Court.

Chapter 13

Procedure in the Court of Appeal

Early in our deliberations it became apparent to us that, if either the length of time required for the determination of an appeal or the expense to the litigants were to be reduced, the court could not be looked upon as a facility through which an appeal progressed in the manner and at a pace determined by the convenience of the parties or their lawyers.

The decision to enlist the assistance of the court is made by the litigants or one of them, but when once the services of the court are invoked, having the carriage of the action should not mean that a party may determine the rate of progress of the matter. That is the prerogative of the court and one which casts on the court responsibility to assure that there be no inordinate delay in the resolution of the matter placed before it.

Even before we had the opportunity of reading the White Paper on Court Administration, we had been convinced that "case-flow management" was a necessary part of any scheme to improve the appellate procedure in Ontario.

The avoidable shortcomings of the present practices seem to be centred in (a) the lack of information a notice of appeal conveys as to the issues to be argued, (b) the absence of any requirement that the respondent disclose the position he intends to take with respect to those issues, (c) the ordering of transcript in excess of the parts relevant to the issues to be argued, (d) the absence of control over the preparation of transcript, (e) the reproduction in the appeal books of all exhibits produced at trial regardless of their relevance to the issues, (f) the failure of the Court to impose and insist on the observance of appropriate time limits at every stage.

In the suggestions we have received in answer to the questionnaire sent to all members of the legal profession, we have been impressed by the number favouring:

(a) greater precision in the proceedings preliminary to the hearing of an appeal;

(b) the reduction of the amount of transcript and of the contents of appeal books;

(c) the introduction of some form of pre-appeal conference akin to the pre-trial conference which is rapidly earning such wide-spread support.

We also benefited by observing the success of certain procedures introduced in England as a result of the Evershed Report of 1953*.

But the procedures we favour for adoption in Ontario are not borrowed from elsewhere. What we propose is designed to make the most economical use of the court's time without imposing on solicitors and counsel unnecessarily time-

*Final Report of the Committee on Supreme Court Practice and Procedure, Sec. VIII, pp. 188-215.

consuming requirements.

A principal purpose of the appellate process is to correct as expeditiously as possible errors in the conduct of the trial and the judgment appealed from in the application of the law relevant to the facts of the case. We believe that the goal of an early hearing and determination of an appeal, requires that, (a) the court be informed, from the outset, of the specific errors complained of by the appellant, (b) the court be made aware promptly of the position of the respondent with relation to each complaint, and (c) there be brought before the court those parts only of the record pertinent to the issues the court will be asked to decide.

The rules of procedure to accomplish this result must impose upon the solicitor for each party the responsibility, as an officer of the court, for the advancement of this objective and invest the court with authority to demand from the solicitor a standard of performance which recognizes that responsibility. However, we do not consider we should attempt to formulate rules but go no further than to set out the following outline of the procedures which we recommend.

Notice of Appeal

An appeal shall be launched by a notice of appeal which, to be accepted by the court, must state with precision:

(a) the judgment or order of the court below against which the appellant intends to appeal,

(b) what findings of fact or issue of law will be in issue in the appeal, including particulars of rulings on the admission of evidence to be challenged and objections to the charge to the jury to be advanced.

(c) the precise order that the appellate court will be asked to make.

Because of the information it will afford the Court as to the nature of the cause of action and the disposition of it below, a copy of the reasons for judgment shall be furnished to the court office along with the notice of appeal or so soon as available.

Transcript of Evidence

Prior to 9th June, 1976 pursuant to the Rules of Practice, the total transcript of the trial proceedings was required to be ordered as a condition of setting down a civil appeal. A Practice Direction of that date modified that requirement and required counsel;

" to avoid ordering the transcribing of any and all evidence that is not essential to an appeal, criminal or civil, an obvious example, but only an example, is evidence as to liability in an appeal only as to damages and vice versa. In all cases counsel are also required to agree as to undisputed facts rather than having evidence to prove them transcribed. Failure of counsel in these respects, and in failing to utilize Rule 498(d) and Criminal Rule 23(3) as applied to appeal books, may invoke the sanctions of the Court."

Our earlier views as to the undesirability of the continuance of the pre-

ordering of transcript has been re-inforced by the results of the Practice Direction. A substantial reduction in the amount of transcript to be produced for the hearing of civil appeals has been achieved. In view of our later references to the ordering of the transcript, the court's requirements will be satisfied at this stage if the Notice of Appeal contains an undertaking by the appellant's solicitor to pay for the appropriate numbers of copies of those parts of the transcript which are required for the hearing of the appeal.

Respondent's Notice

At an early stage after the launching of the appeal, the respondent, if he proposes to ask for any relief other than that granted by the judgment below, or if he proposes to support the judgment below on any grounds other than those set out in the reasons for judgment, shall file a Respondent's Notice setting out the position he will take on the argument of the appeal.

Both the Notice of Appeal and the Respondent's Notice shall be subject to amendment, but after a specified date no amendment to either of them shall be made except by leave granted by the court. In the absence of any amendment, neither party shall be entitled to rely on any ground of appeal or to apply for any relief not specified in the Notice of Appeal or Respondent's Notice.

Securing of Delivery of Record to the Court Office

At present it is the responsibility of the appellant to arrange for the original papers to be forwarded to the Court of Appeal Office from the local office wherein the proceedings were initiated. Appellants' solicitors frequently fail to do so promptly causing delays and requiring the Assistant Registrar of the Court of Appeal to seek the papers. This cause of delay could be removed by requiring the appellant, on the filing of the Notice of Appeal in the court office, to deliver an additional copy of the Notice of Appeal endorsed with a request for the original record, this latter copy to be transmitted by the court office to the office in which the cause was initiated.

The introduction of a comprehensive numerical code system to identify each local office as well as each proceeding, as now in contemplation, will readily identify the appropriate office to which the request is to be sent.

At the time the Notice of Appeal is received an appointment for a pre-appeal conference shall be given.

Preliminary Assessment by Court Officer

With the Notice of Appeal and Respondent's Notice (if any) before him, and the opportunity of perusing the reasons for judgment, the court legal officer should be in a position to make a preliminary assessment of the nature of the appeal and to prepare a report for use by the Chief Justice in fixing the composition of the court to hear the appeal.

Agreed Statement

Immediately after the service of the Notice of Appeal the solicitors for the parties shall endeavour to agree upon a statement to be known as the Agreed Statement which shall set out:

(1) the issues in the appeal,

(2) a statement of the facts
    (a) agreed upon
    (b) disputed,

(3) the parts of the transcript necessary for the hearing of those issues,

(4) the exhibits necessary for hearing of the appeal,

(5) by whom the appeal books are to be prepared, and

(6) the name of counsel to appear on the hearing of the appeal, if then known.

If the Agreed Statement is filed on time and is considered adequate the pre-appeal conference may be dispensed with as unnecessary.

Pre-appeal Conference

If the Agreed Statement has not been filed, or if the court legal officer, after considering the Agreed Statement, considers it necessary that the pre-appeal conference proceed, a pre-appeal conference shall take place on the day already fixed. At the pre-appeal conference the form of the Agreed Statement will be settled or confirmed. When the Agreed Statement is settled at a pre-appeal conference it shall be deemed to be filed. If either party demands the inclusion in the Appeal Book of a document or a part of the transcript to which the other party objects, what is objected to shall be reproduced but at the risk as to costs of the party demanding it.

At the pre-appeal conference the time-table for the filing of appeal books, the Appellant's Statement, and the Respondent's Statement shall be settled. When no pre-appeal conference is held the court officer shall, after consulting the solicitors involved, settle a similar timetable.

When the Agreed Statement has been filed the Court office will then place with the reporter the order for the parts of the transcript which are specified in the Agreed Statement.

The combined effect of the reduction in the volume of transcript by confining it to those parts which are necessary for the hearing of an appeal, and the procedures with regard to the management of the time of reporters which we have recommended, should make possible, except in the most unusual cases, the availability of transcript well within 60 days of the order for it. When this result is attainable it will be possible, at the time of the pre-appeal conference or immediately after the filing of the Agreed Statement, to make an accurate estimate as to the time within which the transcript will be delivered, and to fix a tentative date for the hearing of the appeal, allowing sufficient time for the preparation of the Appellant's Statement and the Respondent's Statement. These will be appreciably shortened by the agreed statement mentioned above.

In order to avoid the attendance in Toronto of solicitors carrying on practice elsewhere, in an appeal in which the office of the solicitor for any party be located over 25 miles from Osgoode Hall, the pre-appeal conference could be held by telephone by means of a "conference call", the court legal officer and the

solicitors for all parties being simultaneously in communication with each other.

Appeal Books

At present the responsibility for the preparation of the appeal books is that of the appellant. To those solicitors who have had even a moderate amount of appellate experience, and who are diligent in their observance of the rules, this requirement presents no difficulty.

From a number of sources it has been suggested to us that the preparation of appeal books should be made a function of the Court and that the parties should be relieved from this task. Some of these suggestions would entail the cost of the preparation of the appeal book being absorbed by the Court, while a number of them suggest that the work be done by the Court but that the cost be chargeable to the parties.

Provided that the cost is not chargeable to the public purse there is no sound reason why appeal books should not be prepared in the court office, provided that sufficient staff is made available for this purpose. In fact, we see substantial advantages to be gained by having the appeal book prepared in the court office, at least for those solicitors who do not prefer to prepare it themselves or who lack experience in the preparation of appeal books.

Every document required by Rule of Practice 498b to be contained in an appeal book will usually be in the possession of the court. At present, under normal circumstances, the exhibits are withdrawn from the court by the appellant's solicitor, and are not returned until copies have been made for inclusion in the appeal books. This procedure seems to entail two disadvantages. One, there is a time-consuming effort in obtaining a consent and in the transfer of the exhibits from the Court office to the solicitor's office and back again, and there is a substantial lack of security, when the original exhibits are taken out of the custody of the Court and placed in the custody of a solicitor to be available to his stenographic staff for copying. Making copies of them in the Court office would be more expeditious, and would lead to greater security, as it would not be necessary to withdraw the exhibits from the custody of the Court: it should also lead to greater uniformity in the production of appeal books which are required for the hearing of the appeal.

Were appeal books to be prepared in the office of the court, no physical equipment would be needed beyond what is now available, but an increase in staff would be necessary.

Experienced counsel who do not find their preparation difficult have expressed a preference for continuing to prepare them in cases in which they represent the appellant. Should any counsel so prefer it should be possible for him to do so.

We see no reason why in civil appeals the preparation of the appeal books should be done at public expense and not at the expense of the parties. Where the appellant is not represented by a solicitor, there are cogent reasons why it should not be obligatory for the appellant to prepare the appeal books, but he should not be relieved of the costs. In criminal appeals by prisoners in person, the practice for years has been for the Attorney General to assume the responsibility for forwarding appeal books to the court. It seems obvious that there would be little likelihood of

the court having before it the necessary appeal books if the preparation of them were left to the prisoner who lacked both the know-how and the facilities to prepare them. In such cases the cost of preparation in the court office would be offset by a corresponding saving in the Office of the Ministry of the Attorney General.

We venture to suggest that the actual cost of preparation in the Court office will not exceed the cost of preparing them in the solicitor's office, although it is doubtful that in the average office there will be accounting procedure whereby the actual cost of the preparation of the appeal book by the solicitor can be determined.

Among the requirements set out in Rule 498(b) as to the contents of the appeal book, Clause (v) refers to the reasons for judgment. It is not uncommon, particularly in cases in which a judgment is delivered at the conclusion of the trial, that the reasons for judgment are transcribed by the reporter as part of the trial proceedings. Where reasons for judgment so appear and also appear in the appeal book, there is an unnecessary duplication which should be avoided. Regardless of whether or not the appeal book is prepared by the parties or by the court office, the rules should provide that the inclusion of the reasons for judgment in the appeal book shall be dispensed with where those reasons for judgment appear as part of the transcript of the trial proceedings prepared by the official reporter.

Appellant's Statement

In view of the contents of the Agreed Statement, the Appellant's Statement shall not be required to contain more than (1) the Agreed Statement, (2) a brief outline of the argument to be presented to the Court, (3) the authorities which are to be quoted in support of it and (4) statutes or regulations relevant to the issues to be argued.

Respondent's Statement

The Respondent's Statement shall be responsive to the Appellant's Statement but need not repeat the Agreed Statement. It will be confined to (1) brief outline of the argument to be presented, (2) the authorities offered in support of the argument and (3) relevant statutes and regulations not included in Appellant's Statement.

Hearing of Appeals

When the foregoing steps have become operative it will be possible to fix well in advance, the date for the hearing of an appeal, usually when the Agreed Statement has been filed. To ensure early hearing the time-table fixed by the court office will have to be adhered to unless unusual events intervene. While every effort should be made in the court office to meet the reasonable convenience of counsel, the hearing of any appeal should not be delayed solely to meet the convenience of counsel.

Adherence of the time-table set for each appeal will not only ensure its steady progress and earlier determination, but what is of particular value to out-of-town counsel and solicitors, will afford more accurate estimates as to the time when any appeal is likely to be heard.

Throughout the foregoing resume we have used the phrase "court legal officer" rather than "Registrar". Our reason for so doing is to be found in our recommendations as to the internal organization of the court office set out in Chapter 15.

To adopt some of the recommended procedures will require only a ministerial act within the court office, e.g. receiving papers, monitoring time-tables, etc.; other procedures are of a quasi-judicial nature and would be within the scope of the legal officer whose appointment we have recommended elsewhere - e.g. the preliminary scrutiny of the notice of appeal, the appraisal of the agreed statement and the pre-appeal conference are examples of such. The specific distribution of duties within the court office will naturally be the subject of rules of practice or the instructions therein embodied.

We recommend:

1. (a) That the ordering of copies of evidence prior to the filing of a Notice of Appeal shall be no longer required.

   (b) That the appellant's solicitor, in the Notice of Appeal, shall be required to undertake to pay for the parts of the transcript necessary for the hearing of the appeal.

   (c) That all orders for transcript of evidence shall be placed by the appellate court office on behalf of the appellant after the filing of the "Agreed Statement".

   (d) That court reporters accept no orders for transcript save through the appellate court office or with its approval.

2. That the issues to be argued shall be clearly stated by the intending appellant in his Notice of Appeal.

3. That in certain circumstances a respondent shall be required to serve a notice (to be designated "Respondent's Notice") in a form similar to a Notice of Appeal.

4. That any party shall have the right to serve a supplementary notice but only with leave after the expiration of a given period.

5. That neither party shall be permitted, without leave of the court, to challenge any finding of fact or raise any issue other than as set out in his notice of appeal, notice of cross-appeal or respondent's notice.

6. That a notice of appeal shall be accompanied by a draft of the order which the appellant will ask the court to make.

7. That immediately after the expiration of the time for filing of respondent's notice the solicitors for the parties shall cause to be filed an "Agreed Statement" to set out:

   (i) the issues to be argued,

   (ii) the facts relevant to those issues:
   (a) agreed,

(b) disputed,

(iii) the parts of record necessary for the hearing of the appeal to be incorporated in the Appeal Books: i.e.
(a) pleadings,
(b) exhibits,
(c) transcript,
(d) the order the court will be asked to make,

(iv) by whom appeals books are to be prepared.

8. That in default of the filing of an "Agreed Statement" within the time specified, instructed solicitors shall attend before a court officer on a pre-appeal conference for the purpose of settling the contents of the "Agreed Statement". In the event of a disagreement between parties, any document or evidence objected to shall be copied or transcribed at the peril as to costs of the party making the demand: at the conclusion of the pre-appeal conference the court officer shall sign the "Agreed Statement" which will thereupon be deemed to be filed.

9. That on filing of the Agreed Statement the court officer shall:

(i) fix a timetable for
(a) delivery of appeal books,
(b) delivery of Appellant's Statement, (Rule 501),
(c) delivery of Respondent's Statement,

(ii) fix a tentative date for hearing of appeal.

10. That the Appellant's Statement shall contain:

(i) the Agreed Statement, with appropriate references to the relevant parts of the record,

(ii) the points intended to be argued,

(iii) a concise statement of the law relied upon and citations of authorities to be submitted for the consideration of the court,

(iv) statutes and regulations relevant to the issues.

11. That the Respondent's Statement shall contain:

(i) the points to be argued,

(ii) a concise statement of the law relied upon and citations of authorities to be submitted for the consideration of the court,

(iii) relevant statutes and regulations not included in the Appellant's Statement.

Chapter 14

Procedure for Direct Access to Court of Appeal

We have already made apparent our conviction that early finality of litigious proceeding is a compelling objective. If, as we contemplate, the Juristic Section of the Court of Appeal will become the principal instrument in Ontario for the development of jurisprudence, to this end it should be possible for a matter which will ultimately come before that Section to reach it without being delayed by its passage through other courts.

We are fully conscious that questions of disputed facts must be crystallized by a judgment rendered after trial. But where the facts are undisputed or have already been found by a trial judge, expedition in the resolution of parties' causes calls for some way of securing a decision of the highest court of final resort on any question of law involved, without the delay and expense entailed by appearing before tribunals whose pronouncements will eventually be reviewed by the court having the last word.

We have already expressed our conviction in this regard by our recommendation that a decision by the General Section is not a necessary preliminary to an application for leave to appeal to the Juristic Section.

Rule 128 of the Rules of Practice, providing for the stating of a question of law in the form of a special case for the opinion of the court, gives some recognition to the desirability of the early finalization of questions which are not of fact alone or mixed law and fact: but it authorizes no more than that the question stated may be brought before a trial court: it does not afford any means of access to a higher court except on appeal from a trial judgment rendered on a stated case. Nor does Sec. 35 of the Judicature Act, which empowers a judge to refer a case before him to the Court of Appeal, give the parties a similar means of advancing the finality of the case.

What is required is a procedure whereby, at any stage of a proceeding, a question of law of general public importance could be brought, forthwith, before the highest court in the Province whenever a decision on that question of law would determine or expedite the resolution of the parties' rights. A similar procedure proposed in England but not adopted was designated "leap-frogging".

Because such a procedure would be a departure from the established routine of the Courts, rigid qualifying conditions would have to apply to its use, of which the principal ones would be the following:

1. The question shall have arisen in a pending proceeding brought to determine the rights of actual parties: no hypothetical question would be submissible to the Court by the use of this procedure.

2. (i) The question shall be one of pure law or the interpretation of a statute with respect to which either:

(a) there is no decision of a court of co-ordinate jurisdiction, or

(b) there is conflict between a decision of an appellate court in Ontario and that of an appellate court of another province or between decisions of appellate courts of at least two other provinces.

or,

(ii) a constitutional issue is involved (for the purpose of such a provision the validity of a regulation would be a constitutional question).

or

(iii) The applicant will seek to establish that a previous decision of an appellate court in Ontario should not be followed.

This procedure should be available at any stage of a proceeding in which the decision to be rendered by the Court could eventually be the subject of an application for leave to appeal to the Juristic Section: the hearing before the Juristic Section should be initiated either --

1. by the application of a party for leave to bring the matter before the Juristic Section; or

2. by a request by the Court seized of the matter for the Juristic Section to entertain a question of law or the interpretation of a statute.

In either case, the Juristic Section would have to be satisfied that the necessary qualifications existed and could refuse to entertain the matter if not so satisfied.

Direct access to the Juristic Section will reduce both expense and time consumed in securing the decision of the highest court in the Province. Once it be accepted that, in the hierarchy of courts, it is not necessary to touch each tier, there seems little reason not to facilitate its employment. If it will accomplish the result sought, the Rules of Practice should be such as to encourage its employment.

We therefore recommend:

That the Rules of Practice include provisions whereby, at any stage of a proceeding whereof the decision of the court will ultimately be appealable to the Court of Appeal, a question of law directly affecting the rights of the parties may be submitted forthwith for the opinion of the Court of Appeal, provide that the attendant circumstances are in conformity with the requirements of the Rules of Practice with respect to such submissions.

Chapter 15

Court of Appeal Office

Having made recommendations as to the future constitution of the Court of Appeal and as to certain basic changes in procedure, there remains to be considered the organization and operation of the court office. In shaping its operation the greatest possible convenience to the litigants and the legal profession along with the most efficient use of judicial time have been the prime objectives.

A fundamental rule of administrative management is that no operation should be performed at a level higher than the lowest at which it is capable of being performed. Put conversely, no person should be engaged in an activity which does not require the capabilities which he possesses. A fair number of the things which engage the attention of appellate judges and encroach on the time which would be otherwise available for what are clearly judicial duties, violates this principle.

The only justification for the survival of such encroachments is the fact that the courts have not been furnished with qualified persons to whom could be delegated some of the activities which judges are called upon to perform. Within the court structure at very few levels are there sufficient persons and there is an almost complete absence of middle management. By way of contrast the Royal Courts of Justice in London have proportionately two to three times the number of staff members. For example, the Crown Office, which is that of the Registrar of the Criminal Division of the Court of Appeal, is directed by a senior barrister of vast experience who has under him a large staff, 28 of whom are professionally qualified barristers or solicitors.

In order to effect a proper realignment which would relieve judges of those duties for which their attention is not necessary, all the activities which now engage the time of appellate judges should be closely scrutinized and those which can be done other than by a judge should be assigned to staff members who must be provided in sufficient number and of sufficient capacity to perform all those functions.

If the plan for the structure of the Court of Appeal we have recommended be implemented, of necessity there would be but one office for both divisions of the Court of Appeal. Any other establishment would involve unnecessary duplication.

In that office a functional division should be recognized at the top. The responsibility for the office should be divided between (a) a manager of non-legal operations and (b) a chief legal officer. Save with respect to such duties as are judicial in their character both of these officials should be responsible to the Director. We have not attached names to these offices but they would closely but not exactly resemble respectively that of a registrar and a master.

Staffing the court office with a chief legal officer may be an innovation, but we believe it to be one in keeping with present business practices. The incumbent must be a highly qualified senior lawyer having the status of a Master. Under the guidance of an experienced member of the Court of Appeal,

there should be transferred to him, in stages, a variety of duties most of which woud be related to interlocutory matters such as the extending of time fixed by the rules, the granting of adjournments, the hearing of interlocutory applications and the making of interlocutory and consent orders, including orders dismissing appeals. In addition to the foregoing, he and the legal officers under his supervision should be responsible for the preliminary screening of each Notice of Appeal, and for preparing the Chief Justice of Ontario a memorandum informative as the nature of the appeal; he should preside at pre-appeal conferences to settle the parts of the record to be reproduced for the hearing of the appeal, and pass on the sufficiency of the appeal books, fix time-tables for the delivery of the appellant's and respondent's statements and fix tentative dates for appeal: he should settle the forms of the order of the court in the event of the parties failing to agree upon it.

The manager of the non-judicial operations need not necessarily have extensive legal experience but he should have very proven accomplishment in managerial function and office practice. He should, by the establishment of job descriptions and allocations of staff, direct the receiving and recording of documents, and the movement of paper within the court; he should monitor all time-tables, place orders for transcript and monitor its delivery, prepare appeal books, prepare and supervise all lists for the hearing of appeals, supervise the in-court operation and record all statistics.

When one considers the present rate of technological progress, it becomes apparent that within the court office there must be people who are at all times abreast of all developments in court operation and management, in physical equipment available for the operation of the court offices and in practices in other offices which are adaptable to their use. In what may well be the last days of the paper age, it is vital to concentrate on better ways of moving around information: the employment of memory banks might be a more expeditious and effective way of ordering the courts' works: tomorrow's technique may exceed even our most imaginative hopes.

What we are referring to is not the periodic introduction of outside management consultants to review and revise the operation of the court office, though at times that procedure may have its own peculiar advantages. What we are advocating is a built-in establishment of persons of varying skills through whose daily supervision there may flow to upper management the results of the operations, including the adequacies and deficiencies, thus enabling decisions for the better operation of the court to be made in the light of the current information available. Through the same channels there would continue to flow down suggestions and directions for the improvement of the process.

The responsibility for maintaining a high state of efficiency in the office should be the joint responsibility of the manager of non-legal operations and the chief legal officer and will require continuous vigilance as to procedures and methods of physical operation. Due to the peculiar requirements of an office such as that of the Court of Appeal, improvements in its operation are more likely to come from within rather than from outside.

If, as we suggest, there be set up within the court structure a research branch which is committed to the projection of the future needs of courts, the two officers of the appellate court office should work closely in touch with this group in order that the requirements of the appellate courts in the matter of physical equipment and human resources may be known well in advance.

It has been the experience in the short time we have spent investigating the appellate court operations that the members of the Bar who are familiar with appellate work can offer great assistance with respect to those procedures which will advance the cause of litigants and at the same time reduce the expenditure of effort within the court. This is a source of assistance which should be used: as well as broadening the scope of the scrutiny of the court's performance, and giving the members of the Bar a role in making changes, it will help to make these changes acceptable.

We suggest that the Chief Justice of Ontario constitute a committee to be composed of senior members of the Bar and members of the Court of Appeal; this committee should meet with the senior officers of the court office on a regular basis at predetermined times to review the adequacy of the performance of the court in the past and consider measures for its improvement in the future.

We are not unmindful that within the Supreme Court it is usual to separate physically the function of registrar and master: our recommendations are not in any way intended to blur that distinction. But it is obvious that the duties of a master to be performed within the Court of Appeal will be of a specialized nature and will be better performed by one who is permanently related to the appellate function and one who, together with the chief of non-legal operations, can develop the structure and procedures which will be necessary if the court is to give to the people of Ontario the quality of service to which they are entitled.

The accompanying diagram illustrates the possible distribution of responsibilities between the manager of non-legal operations and the chief legal officer.

We therefore recommend:

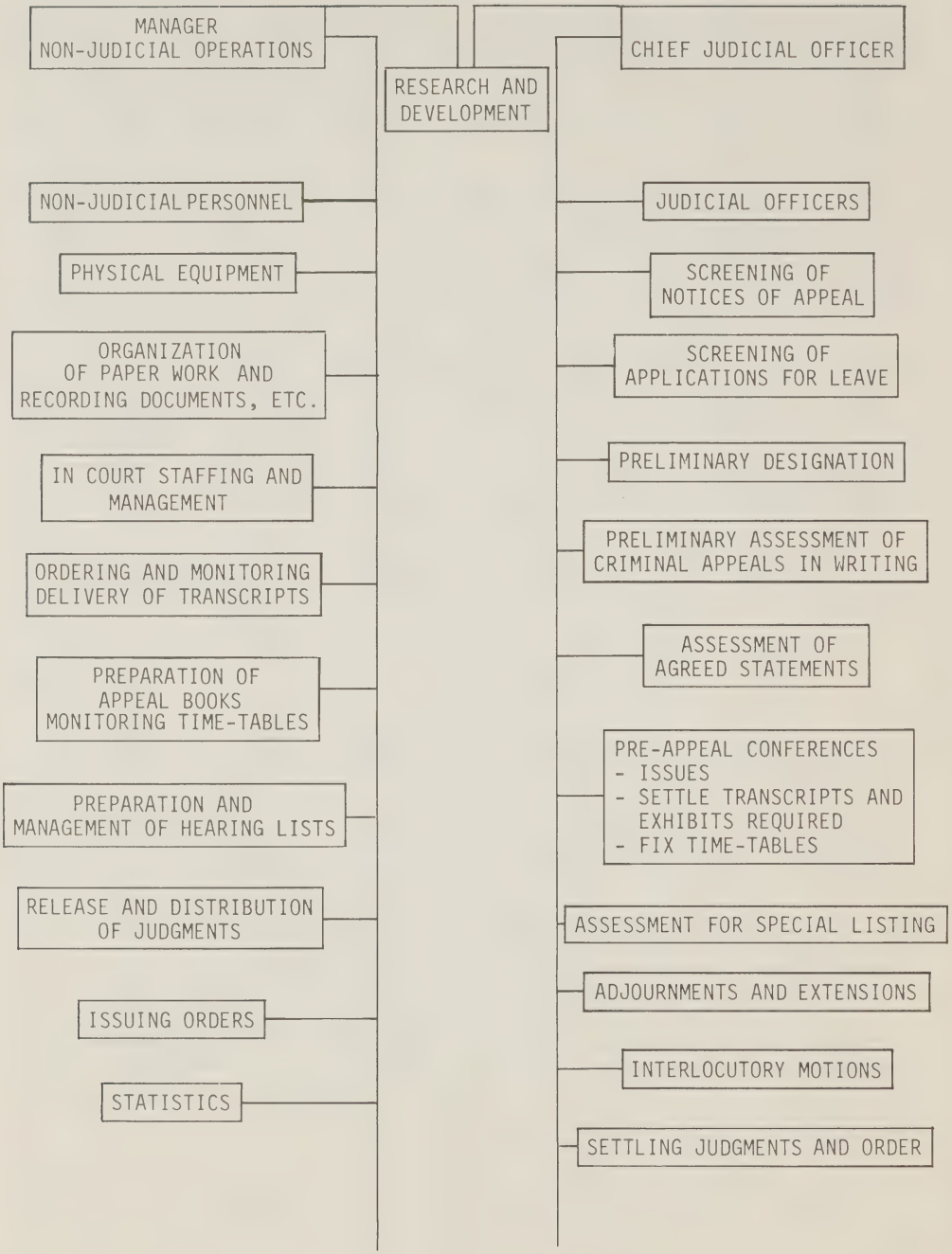
1. That the office serving the Court of Appeal be reorganized under the joint control of (a) a manager of non-legal operations and (b) a chief legal officer whose status would be that of a Master.

2. That the court office be adequately staffed in keeping with the requirements specified by the manager of non-legal operations and the chief legal officer.

3. That any activity now being performed by an appellate judge which does not require to be performed by a judge appointed pursuant to the Judges Act of Canada be performed by the chief legal officer and his staff.

4. That it be the joint responsibility of the manager of the non-legal operations and the chief legal officer (a) to achieve the greatest efficiency in the operation of the court office, (b) to study improvements in the operation of the court office to the end that it may better serve the litigants, their solicitors and counsel and the judges and (c) to initiate changes to this end.

FUNCTIONAL ORGANIZATION



Chapter 16

Transcripts of Evidence

The most significant cause of delay in the hearing of civil appeals is the time occupied in transcribing the evidence at trial. The fact that the Court of Appeal has been able to hear promptly all appeals as they have been ready for hearing has disguised the alarming fact that serious delay occurs in the preparation of those appeals in which a transcript of evidence is required. Where no evidence is required to be transcribed -- e.g. in an appeal from a proceeding commenced by originating notice of motion, the argument of the appeal is normally heard by the Court within 3-4 months from the date of the service of the notice of appeal, but where for the hearing of the appeal a transcript of evidence is required, it is not unusual for that time span to be increased by 9-12 months.

The situation with regard to criminal appeals is not as serious as it is in civil matters, but this result is largely due to the priority which is accorded to the preparation of transcript for criminal appeals. Obviously this practice compounds the delay in civil cases.

Delays of such magnitude are intolerable and, we are convinced, are unnecessary. The correction of this condition is not in any way dependent upon the implementation of our recommendations made with respect to the structure or procedure of appellate courts. Measures of correction must be introduced whether or not our other recommendations are implemented. They will be more urgently required should our recommendations as to the reduction in the amount of transcript required for any appeal fail to be implemented. On this account we propose to deal with this subject separately and apart from our recommendations as to procedures within the appellate court.

Experience in other jurisdictions indicates that expeditious delivery of transcript is attainable. In England the target date for delivery of transcript is 8 weeks after the order is placed. Only infrequently is this time exceeded. In Scotland, 5 weeks are allowed and there are few delays beyond this time. The American Bar Association in adopting standards for the performance of American appellate courts has recommended delivery within 30 days of the order. Although not universally attained this standard is being met in a large number of jurisdictions in the United States of America. In our opinion, the immediate goal to which the Ontario courts should direct their efforts would be completion of transcript within 60 days; the ultimate goal should be 30 days.

We are aware that in very recent years some variations have been introduced, but the following brief outline describes the procedure which generally prevails in the verbatim recording of trial evidence in the Supreme Court, following a plan which seems to reflect the perpetuation of one evolved in the early days of the Province to meet conditions then prevailing. In court, the recording is done almost exclusively by reporters employed by the Ministry of the Attorney General, one of whom is assigned to each member of the High Court of Justice. A reporter attends the trials presided over by the judge to whom he is assigned, travelling from his place of residence, usually in Toronto, to the place of trial. The reporter is paid a fixed salary and reimbursed his expenditures for travelling and for living expenses when away; when a transcript of evidence is required he is entitled to a fee based on a fixed price per page.

At the present time most, if not all, of the Supreme Court reporters record their notes of evidence either by shorthand or by stenotype. The translation of the notes made by the reporter into a legible form capable of reproduction in multiple copies (the master copy) is the responsibility of the reporter. The printing of the necessary copies for the use of the parties and the Court is done under the direction of the Ministry.

Unless the reporter has the assistance of a reader who is able, without the constant presence of the reporter, to translate those notes, the reporter must either personally type the master copy from his notes or dictate those notes into a voice-recording device which a typist uses to type the master copy. At the present time few, if any, of the reporters employ readers.

We have been informed by representative reporters that, on the average, it requires 5-7 hours of a reporter's time to reproduce the transcript of the testimony given by a witness in one hour.

In recent years the aggregate time of reporters spent in Court has been such that adequate time has not been available for the translation of the notes of evidence for the purpose of appeals. As a consequence, the delivery of the transcript is delayed until the reporter can make time for its completion. The imbalance between the time spent in Court and the time required to complete transcripts is persisting and if anything increasing. Between June and November of 1976 the amount of evidence ordered and undelivered increased by approximately 10%.

A publication of the National Center for State Courts entitled "Management of Court Reporting Services" sets out seven recognized techniques for the recording and transcription of trial court proceedings. We have not felt equipped to assess their relative merits and recommend the adoption of any one. However, that described as "Computer Aided Transcription" appears to be adaptable to the needs of the Supreme Court of Ontario to give, at an early date, significant results in expediting the delivery of transcript.

Investigations conducted by the Hon. W.Z. Estey, while Chief Justice of the High Court, led him to believe that the technique was worthy of more exacting clinical experiments, which he was prepared to have carried out under actual court conditions. No results of such experiments are at this date available. We are of the view that investigation of this technique should continue until some meaningful conclusions are produced.

Even assuming that these experiments lead to a vastly improved system of courtroom reporting and production of transcript, the following conclusions seem to be undeniable and to point to the necessity of looking elsewhere for any way of immediately improving the situation.

1. The transcript of evidence of trials which have already been held, the notes of which are in shorthand or stenotype cannot be effected by future improvement in in-court reporting.

2. The conversion of Ontario courts to any new method will not be accomplished overnight. There are over 100 courtrooms in the Supreme Court and the County Court, and until the changeover is accomplished dependence on the present system will continue. It is reasonable to assume that for a period of five to ten years there will still be substantial dependence on the present system.

We consider that there are two distinct problems which require attention if the expeditious disposition of appeals is not to be adversely affected by the unnecessary delay in the completion of transcript for use on appeals.

The first problem is the early production of the transcript of evidence in cases already tried, where the notes have been recorded by the reporter but have not been translated by him. Here, no future improvement in the method of recording evidence can be applied. It would be least disruptive of the ongoing work of the trial courts if readers could be provided for each reporter, so that his notes could be translated without any encroachment on the time he is expected to be in court. As far as it is possible to adopt this procedure it would be preferable to do so; but if readers are not available in sufficient numbers, the only other choice is to withdraw each reporter from court until he has typed or dictated all notes of evidence taken by him and ordered for an appeal, and replace him in court by another reporter.

The second problem is to prevent the recurrence of the present breakdown and maintain the delivery of completed transcript within a predetermined time from its order. We anticipate that the changes resulting from the reduction in the amount of transcript required to be filed in the Court of Appeal (Chapter 13) will have a noticeable effect. No doubt the ultimate solution will be found in the utilization of the advanced methods of recording evidence now developed or in the course of development. Until such techniques are introduced and are operative, reliance must be placed on the management of each reporter's time coupled with the use of readers to the extent that they are available.

Since the amount of transcript which any single reporter is required to produce is completely unpredictable until the actual order is placed with him, a ratio of time in court to time out of court which will apply to every one of the Supreme Court reporters cannot be established. It is however, only reasonable that the work of a reporter requiring his attendance in court and requiring his personal attendance for the translation of the transcript should ordinarily be confined to the usual working hours of working days. Expecting a reporter to produce the orders for transcript by working at night and on the weekends is an unjustifiable invasion of his principal duty of recording the proceeding in court and in all likelihood will result in a lowering of his efficiency in court. To accomplish the desired end the assignment of the time of each reporter must be done individually.

In Ontario, the reporters have traditionally been considered to be under the direction of the High Court of Justice because their visible presence is in the courts presided over by the High Court Judges. Insofar as a reporter is needed to read back notes of the evidence given during a trial, or to read back portions of the charge or the objections to the charge, in fact, as regards everything that happens in the court room, he is a necessary element of the trial court machinery and he is properly under the direction of the judge presiding at the trial. When, however, the reporter has finished taking notes at trial, the production of the transcript for an appeal concerns only the appellate courts. It is on this account that, until the plan proposed by the White Paper is implemented, the control of the time of each of the reporters must be under the joint management of the Chief Justice of Ontario and the Chief Justice of the High Court to the end that each reporter be afforded adequate time to perform his function of recording testimony and his equally important function of producing the transcript of it.

In operation, this will mean that all orders for transcript must be

placed through the appellate court office, and that within that office there must be established the device for monitoring the demands upon the time of the reporters resulting from the orders for transcript given to them by the court. Requests for the release from court of a reporter who is not able to produce, within the appropriate time, all transcript which is ordered from him must emanate from the same source and must be implemented by an officer responsible for the operations of the court reporters.

It seems improbable that, at least for some time in the immediate future, delays can be eliminated except by the use of more reporters. Ontario has traditionally employed individual reporters on a full time basis and naturally there is a tendency to look upon that method as "the way it is done". In both England and Scotland, tenders are called periodically by the court from firms of shorthand reporters, and contracts are let for the supply of reporters to take notes of evidence in the court. In England, separate contracts are made in larger centres with local firms of reporters. The evident satisfactory results of this procedure are such that further explorations of its feasibility should be made, whether in substitution for or as supplementary to the existing system.

Undoubtedly, some High Court Judges who have become accustomed to the presence of one reporter in all courts in which they preside will not favour the presence of substitutes. However, it is quite apparent that the present allocation of reporting time results in too much of the time of some reporters being spent in court and too little time being made available to produce transcript; unless there are to be recurrences of unreasonable delays caused by the dilatory delivery of finished transcript, it is essential that for each reporter there be maintained a working schedule which will provide for him a proper balance of time in and out of court, in order that he may produce in the time out of Court the transcript ordered with respect to the evidence recorded by him when he is in court. This need is accentuated by the prolongation of trials recently observable. It is now not unusual for trials to last weeks, sometimes even months. In such a trial, if one reporter is to sit continuously in court, the possibility of obtaining within a reasonable time a transcript of the evidence taken during his time in court is virtually negligible. To avoid delays from this cause where a lengthy trial is expected, provision must be made for the rotation of reporters so that no one reporter will be faced with the production of an unreasonably long transcript. It is quite appreciated that, where one reporter has taken the evidence of any part of the trial, he must remain available during the whole course of the trial in case he is called to read back his notes, but we do not think that this in any way should make impossible the distribution of the time of reporters in court so that long continuous sessions at one trial are not imposed on any one reporter.

We therefore recommend:

1. That it be the personal responsibility of the solicitors to bring before the court only those parts of the transcript of the trial evidence which are relevant to the issues which are to be argued on the hearing of the appeal;

2. That no transcript of trial evidence be required to be ordered until after the necessity for it has been agreed upon by the solicitors for the parties or determined by the chief legal officer of the court;

3. That all orders for transcript of trial evidence required for the hearing of an appeal be placed by the appellate court office, the solicitor for the appellant by filing his Notice of Appeal having undertaken to pay for the necessary copies of

transcript; and that no stenographic reporter who had taken evidence at a trial shall prepare any transcript of his notes to fill any order placed otherwise than through the court office unless he has completed the delivery of all transcript ordered through the court office;

4. That, save in exceptional cases where the chief legal officer shall have granted an extension of time, the delivery of transcript of evidence be required to be made within 60 days of the placing of the order therefor, and that ultimately the requirement be that transcript be delivered within 30 days;

5. That, subject to the provisions hereinafter set out, the in-court control of the stenographic reporter continues to be in the presiding trial judge;

6. That the work required of stenographic reporters subsequent to the delivery of the trial judgment be under the control of the Chief Justice of Ontario; that he in consultation with the Chief Justice of the High Court have the right to require any reporter to refrain from attending Court for as long as is required for that reporter to complete and deliver any transcript of evidence required for the hearing of an appeal;

7. That the Ministry of the Attorney General provide a substitute reporter to take the place of any reporter so required to be absent from court;

8. That the court office be required to advise the Chief Justice of Ontario when default in the delivery of transcript occurs or is reasonably to be anticipated;

9. That consideration be given to retaining the service of independent reporters whenever it be necessary to withdraw any reporter from attendance in court;

10. That the Ministry of the Attorney General explore the feasibility of letting contracts by tender in selected larger centres, for the provision of reporting services necessary for specified courts in or conveniently accessible to such centres.

Chapter 17

Law Reporting

In a legal system such as that of Ontario, uniformity and consistency in the interpretation and application of the law depends, to a large extent, on the prompt and accurate dissemination of the decisions of courts, particularly of appellate courts.

The principal vehicle by means of which decisions are made known are the law reports in which are printed the texts of the judgments deemed by their editors to be noteworthy contributions to the body of the law.

Because the whole area of law reporting is under investigation by bodies better equipped for that purpose than we are, we have not attempted to make any exhaustive studies in this area. We do, however, feel we should commend the fact that this subject is receiving such consideration, and emphasize the disruptive effect on the administration of justice which will result if every important decision of a court is not made promptly available to all who may be concerned with it.

We feel also that we should make some comments as to the encroachment on the time of the law clerks to the Court of Appeal brought about by the work of editing the "Blue Sheets".

A few years ago the absence of prompt information on recently decided cases was the cause of continual embarrassment to the members of the Court of Appeal when it was found that the case last reported might not be the latest authority on the subject before the court. As a result, internally the Court of Appeal, using the services of the law clerks assigned to it, circulated weekly for the information for the members of the court, notes of the decisions released by the court in the preceding week. The value of this publication was such that members of the legal profession sought its benefit. Ultimately, from it were developed the "Blue Sheets" which now appear in each weekly part of the Ontario Reports.

The editing of the "Blue Sheets" engages practically the whole time of one of the four law clerks assigned to the Court of Appeal and part of the time of one of the justices who supervises this operation. We do not consider that the time of a member of the court or of a law clerk who is appointed to assist the judges in the research of law necessary for the hearing and deciding of appeals before the court should be diverted to this editorial function.

In the presentation of the Supreme Court of Ontario to the Law Reform Commission it was submitted that the law reporting function was such an essential part of the operation of the Courts that the editor of law reports should be an official of the courts. No doubt, the investigations now under way will deal with this question. But whether or not the editor of the law reports be an official of the court the "Blue Sheet" operation should be but one facet of the overall reporting function and the work of producing the "Blue Sheets" should be integrated into the production of the Ontario Reports. Now the two operations are separated and there cannot help but be some duplication of effort, the editor of the Ontario Reports again analysing the reasons for judgment which have already been read and summarized by the law clerks.

Our recommendations with respect to law reporting are confined to the following:

(1) That despite the fact that we feel that the publication of reports of decided cases should not be a function of the courts, the early availability of accurate and adequate reports is so necessary for the proper administration of justice that the quality and expedition of reporting should at all times be maintained at standards acceptable to the courts;

(2) That the law clerks be relieved from the responsibility of editing of the "Blue Sheets".

Chapter 18

Forecasting and Statistics

Unless equality before the law is to become an unfulfilled cliché, the courts must have human and physical resources adequate to cope with the causes of all litigants presented to them and to enable them to operate at a high state of efficiency.

Unlike service organizations in the private sector, courts are unable to limit their output to what their facilities will reasonably serve. A court must respond to the demands upon it no matter how much those demands appear to exceed the ability of the court to handle them. On this account there must be constant examination of the trends in the future need for courts, and the exercise of reasonable foresight in anticipating the facilities which will be adequate for those needs.

In a jurisdiction such as Ontario where there is every indication that the population and the economic life of the Province will continue to expand, this means that court facilities must continue to expand for the foreseeable future. When, where and by how much are the questions the answer to which must be known well before the expansion takes place.

While the appellate courts are a comparatively small part of the administration of justice, it appears to us that what has occurred with respect to them is symptomatic of the problem facing all courts. In the past 10 years there has been a recurring, if not constant, need to alleviate the pressure on the Court of Appeal but in the absence of any reliable methods for foreseeing future needs such remedies as have been offered oft-times proved less than required by the time they became operative. As a consequence, the Court has literally moved from crisis to crisis. What signs there were of the impending conditions were not appreciated sufficiently early to allow proper corrective measures to be taken before they became overdue.

This lag in anticipating needs is partially accounted for by the fact that the provision of an additional courtroom or court office has rarely been accomplished within a period of 5 years. The time for increasing the size of a judicial body is not as long, but due to the necessity of complementary amendments to the Judges Act of Canada and the Judicature Act of Ontario, two years has been required for the authorization and appointment of an additional judge to the Supreme Court of Ontario. We realize that the Federal Government has moved toward shortening this time by establishment of "spare judgeships" which can be used for the appointment of extra judges, pending the amendment of the Judges Act. This has substantially reduced but not eliminated the time lag in addition to working force of the courts.

Additional judges mean also an increase in court officers and supporting staff, all of whom require special training. The effectiveness of additional judges can be completely nullified if there be a deficiency in the support services necessary for the operation of the courts. We need only point out, as an example of this, the fact that the length of time now required to bring an appeal to hearing is determined not by the availability of judges but by the lengthy time required for

the stenographic reporter to produce the transcript of the trial evidence.

We have been struck by the absence of any developed model for the use of past experience and available data to project the future needs in courts. Our reliance on population projections made by Statistic Canada results from the lack of any developed mechanism for forecasting future needs in the administration of justice. In fact it appears that there is no recognized catalogue of what data is significant for this purpose. We are conscious that many factors, sociological, demographic and economic, influence the generation of the need for the courts, but we have been unable to uncover any studies in Canada which have attempted to lay any basis for court needs.

We have been fortunate in securing, on a loan basis, the assistance of Shashi N. Sharma, Group Leader, Statistical Consulting Central Statistical Services, Ministry of Treasury, Economic and Intergovernmental Affairs; during the progress of our deliberations he has been assisting us in our quest to determine if reasonably accurate forecasts can be developed.

Having had brought to our attention the work of Professor Gerry Goldman of the Department of Political Science, Northwestern University, we were able to have made available Professor Goldman's research and conclusions to Mr. Sharma and to provide opportunities for consultation between Mr. Sharma and Professor Goldman.

As a result of Mr. Sharma's work, we are convinced that accurate short range (5 years) and reasonably accurate long range (10 years) projections of requirements in the matter of human resources and physical equipment for the administration of justice are possible. The imposition of new jurisdictions on courts by legislative action is entirely unpredictable, and the intervention of such legislative changes will always undermine the precision of forecasts, but even the possible effect of such changes is not entirely incapable of some measure of prediction.

In this connection, it is interesting to note that in the United States, Chief Justic Berger has urged that Congress be required to prepare an assessment of "Judicial impact" before enacting any legislation which will impose additional burdens on the Courts.

The work that has been done elsewhere will greatly assist in the identification of the factors which influence the measure of future needs. The basic statistical data is available either from Statistics Canada or within the offices of the Ministries of the Ontario Government, and it will not be necessary that there be set up a comprehensive self-contained operation. The rationalization of available data and their co-ordination through some court-oriented person could go a long way towards accomplishing what we consider to be desirable.

At our request, Mr. Sharma has prepared a proposal in which he has set out the structural requirements and associated elements of such a model. Of necessity, this proposal is somewhat technical in its terminology, and on this account it is not reproduced in this Report. We have placed it in the hands of the Attorney General and are prepared to make its contents available to any one whose interests and capabilities will enable him or her to benefit from it.

Our object has been to detemrine the feasibility of providing means of forecasting the needs of the appellate courts of Ontario. But it is obvious that the

collection of data and the projection of needs is equally important with respect to all courts of justice. In view of the comprehensive concept of court administration which is outlined in the White Paper, it would seem to us that the activity we have described would be one of the fundamental functions of the Office of Court Administration and would be located within it.

We therefore recommend that the Attorney General assume the responsibility for creating the necessary framework for the projection of court needs in Ontario on a long term basis, for a period of at least 10 years, and on the short term and specific basis for a period of 5 years. If the proposals of the White Paper are implemented our recommendations would be to direct this responsibility to the Office of Court Administration.

While any attempt to forecast the future needs of the administration of justice in Ontario will rely heavily on the availability of the proper statistics of past and present operations, there are many other purposes served by statistics. The Ministry of the Attorney General requires information which may be significant to the Legislature but of very little use to the courts. In earlier days when court offices collected fees itemized on a tariff and at least some affected were renumerated on a fee basis, statistics were inseparable from financial accounting; this has long since ceased to be an important factor for many years nevertheless, court offices have been burdened by being required to make many reports on the performance of the courts. Notwithstanding the volume of figures which have been recorded and stored away, there are gaps and blank spaces on matters which one would have considered important, and duplication arising from the absence of any comprehensive organizing of information requirements.

Despite the presence of the Management Information Service in the Ministry of the Attorney General which affords rapid retrieval of any information that has been stored, some statistics which we sought were not available or not available in the form which we considered to be meaningful. More detailed studies are required to isolate the areas of information which will assist those who are responsible for the administration of justice, to regulate the system for the present and prepare it for the future.

With the availability of the sophisticated facilities of Management Information System it would seem that each statistic should be collected only once and be capable of retrieval for the use of any person who needs it. There should be no necessity for any one officer to report statistics to another.

As a foundation for the specification of data required, the first step must be the identification of the need within the court which is to be served by any particular datum. This step is one for the professional in court administration or for the persons who are responsible for performing the court functions.

Against these requirements, a survey of the available sources of information can be carried out and the exact nature of the statistical information to be recorded can be conveyed to each source.

All such information must be built into a system which will serve to make possible the retrieval of any part of it which is appropriate for the needs of the person seeking retrieval.

So far as the information is meaningful to the administration of justice, a co-ordinator will be the focal point, gaining from all possible users their

requirements, translating those requirements into comprehensive specifications of the data to be recorded and the person by whom said data are to be recorded,and developing the programme by which appropriate data are recoverable.

We recommend:

1. That the Attorney General assume the responsibility for creating the necessary framework for the projection of court needs in Ontario on a long term basis, for a period of at least 10 years and on the short term and specific basis for a period of 5 years. If the proposals of the White Paper are implemented our recommendations would be to direct this responsibility to the Office of Court Administration.

2. That studies be initiated with respect to the recording of statistics of court operations to the end that

(a) all data which have a recognizable use be collected: no data for which a need cannot be demonstrated continue to be collected;
(b) one input of all statistics to be recorded be determined;
(c) the retrieval of data significant to any use be facilitated.

Whether any action be taken to implement our recommendations with respect to the structure and membership of the Court of Appeal will depend upon the approval of the executive branch of government and the enactment of amendments to the Judicature Act.

Most, if not all, of the remainder of our recommendations are not dependent on the adoption of the major ones, and may be made operative without any statutory changes. Some may require amendments to the Rules of Practice but many involve only administrative directives.

We have enjoyed constant communication with the members of the Civil Procedure Revision Committee now engaged in revising the Rules of Practice, under the Chairmanship of Walter B. Williston, Esq., Q.C.: they have been kept informed of the nature of the procedural changes we contemplated and we have reason to believe that no conflict is seen between our proposals and the procedures that Committee favours.

Regardless of the fate of our major recommendations, we urge that early consideration be given to adopting our recommendations which do not entail statutory amendments.

All of which is respectfully submitted,

Robert Carter
B. O'Brien
Clay M. Powell
James M. Tory
Arthur Kelly (Chairman)

March 10, 1977.

Appendix A

Summary of Recommendations

Structure and Jurisdiction of Court

Chapter 6:

1. That the jurisdition now vested in the Court of Appeal and the appellate jurisdiction now vested in the Divisional Court, be conferred on and exercised only by the Court of Appeal constituted in accordance with the following recommendations:

2. That, subject to temporary provisions to prevail during the transitional period, the Court of Appeal be composed of two sections:

(a) One expeditiously to hear and dispose of appeals in which there is presented for resolution no question of law of on-going public importance, herein referred to as the General Section;

(b) One to hear appeals involving questions of law, the decisions upon which will be of importance to the public generally or some segment of the public, as on-going expositions of the law, and to exercise a supervisory review power herein referred to as the Juristic Section.

3. (a) That the Juristic Section consist of:

(i) The Chief Justice of Ontario;

(ii) The Associate Chief Justice (Juristic Section);

(iii) Six other members of the Court of Appeal each of whom shall be assigned permanently to be a member of the Juristic Section.

(b) That the General Section consist of the Associate Chief Justice (General Section) and all other members of the Court of Appeal.

4. That assignments to the Juristic Section to fill vacancies occurring in its membership be made by the Chief Justice of Ontario in consultation with the members for the time being of the Juristic Section; that the members of the Juristic Section shall continue to be eligible to sit as members of the General Section and will be expected to do so as the need may arise.

5. That for the effective performance of the primary function of the Juristic Section the members thereof be, and continue in the future to be limited to eight included in which number shall be the Chief Justice of Ontario.

6. That there be no limit on the number of members of the Court of Appeal, the number to be subject to additions from time to time in order that there be no delay occasioned to litigants due to the unavailability of a panel of the court; on the basis of the present volume of appeals its membership should be eighteen.

7. To the end that each of the two Sections normally be the terminal point of each appeal heard by it, and to avoid the two Sections being successive stages of appeal invocable at the instance of litigants, whereas an appeal to the General Section shall be as of right, an appeal to the Juristic Section shall proceed solely with leave of that Section.

8. That since there is but one Court of Appeal both Sections shall be invested with the identical jurisdiction and each shall be empowered to give judgment upon any appeal which comes before it.

9. That a Notice of Appeal shall be effective to bring an appeal on for hearing:

(i) before the General Section if no application for leave to proceed in the Juristic Section be made within a specified number of days or an application for leave to proceed in the Juristic Section shall have been refused;

(ii) before the Juristic Section if leave therefor be granted upon the application of any party to the appeal, brought within a specified number of days of the filing of the Notice of Appeal.

10. That the Juristic Section be empowered to review and revise if it so elects, a decision pronounced by the General Section or any proceeding before it,

(a) on the application of a party thereto,

or

(b) at the request of the General Section made with the concurrence of the parties thereto.

11. That the decision of the Juristic Section on such review be the judgment of the Court of Appeal on such appeal.

12. That the present appellate jurisdiction of the Divisional Court be terminated.

Chapter 7:

1. That the appellate jurisdiction conferred by the Criminal Code on the Court of Appeal, continue to be exercised by the Court of Appeal constituted as we have recommended.

2. That only those criminal appeals with respect to which the Juristic Section has granted leave to appeal be heard and disposed of by it.

3. That all other criminal appeals be heard and disposed of by the General Section.

In-Court Operation

Chapter 11:

1. That appeals continue to be presented to the Court of Appeal by oral

argument.

2. There be no fixed or arbitrary limits on the time permissible for argument by counsel.

Chapter 12:

1. That the Juristic Section sit only in Toronto.

2. That the General Section be authorized to sit in any place in Ontario.

3. That the Rules of Practice and the Criminal Appeal Rules provide that, in appellate matters, any document may be filed in any local office of the Supreme Court.

Conservation of Judicial Time

Chapter 9:

1. That there be appointed to the staff of the Supreme Court of Ontario for the assistance of the Court of Appeal exclusively a qualified and experienced barrister to have the status of a master to whom shall be delegated such duties as shall relieve the judges of the Court of Appeal from encroachment on their time by matters not requiring the attentoin of a judge, e.g. motions for adjournments, or enlargement of time, applications for security for costs and staying of execution.

2. That with the approval of the members of the Court of Appeal, Rules of Practice be promulgated to define the matters which such legal officer is empowered and required to dispose of.

3. That to lessen the administrative duties to the Chief Justice of Ontario, each of the Juristic Section and the General Section be provided with an Associate Chief Justice.

4. That no member of the Juristic Section accede to any request to perform duties beyond the scope of his judicial responsibilities unless the approval of all members of the Juristic Section be given.

5. That no member of the General Section be asked to accept an appointment requiring the performance of duties beyond the scope of his judicial responsibilities unless adequate provision shall have been made for the performance, during the time in which he is engaged on such non-judicial duties, of the judicial duties which otherwise would have been performed by him.

Chapter 10:

1. That law clerks continue to be made available to the members of the Court of Appeal and that the number be increased from time to time as required by the Chief Justice of Ontario.

2. That there be attached to the Supreme Court of Ontario a full-time qualified director of research whose duties would include the co-ordination of the work of the law clerks.

Chapter 17:

1. That despite the fact that we feel that the publication of reports of decided cases should not be a function of the courts, the early availability of accurate and adequate reports are so necessary for the proper administration of justice that the quality and expedition of reporting should at all times be maintained at standards acceptable to the court.

2. That the law clerks be relieved from the responsibility of editing of the "Blue Sheets".

Procedure in Court of Appeal

Chapter 13:

1. (a) That the ordering of copies of evidence prior to the filing of a Notice of Appeal shall be no longer required.

(b) That the appellant's solicitor, in the Notice of Appeal, shall be required to undertake to pay for the parts of the transcript necessary for the hearing of the appeal.

(c) That all orders for transcript of evidence shall be placed by the appellate court office on behalf of the appellant after the filing of the "Agreed Statement".

(d) That the court reporters accept no orders for transcript save through the appellate court office or with its approval.

2. That the issues to be decided shall be clearly stated by the intending appellant in his Notice of Appeal.

3. That in certain circumstances a respondent shall be required to serve a notice (to be designated "Respondent's Notice") in a form similar to a Notice of Appeal.

4. That any party shall have the right to serve a supplementary notice but only with leave after the expiration of a given period.

5. That neither party shall be permitted, without leave of the court, to challenge any finding of fact or raise any issue other than as set out in his Notice of Appeal, Notice of Cross-Appeal or Respondent's Notice.

6. That a Notice of Appeal shall be accompanied by a draft of the order which the appellant will ask the court to make.

7. That immediately after the expiration of the time for filing of Respondent's Notice the solicitors for the parties shall cause to be filed an "Agreed Statement" to set out:

(i) the issues to be argued,
(ii) the facts relevant to those issues:
  (a) agreed,
  (b) disputed,
(iii) the parts of the record necessary for the hearing of the appeal

to be incorporated in the Appeal Books: i.e.
(a) pleadings,
(b) exhibits,
(c) transcript,
(d) the order the court will be asked to make,
(iv) by whom appeal books are to be prepared.

8. That in default of filing of an "Agreed Statement" within the time specified, instructed solicitors shall attend before the court officer on a pre-appeal conference for the purpose of settling the contents of the "Agreed Statement". In the event of a disagreement between parties, any document or evidence objected to shall be copied or transcribed at the peril as to costs of the party making the demands; at the conclusion of the pre-appeal conference the court officer shall sign the "Agreed Statement" which will thereupon be deemed to be filed.

9. That on filing of the Agreed Statement the court officer shall:

(i) fix a timetable for
(a) delivery of appeal books,
(b) delivery of Appellant's Statement, (Rule 501),
(c) delivery of Respondent's Statement,
(ii) fix a tentative date for hearing of the appeal.

10. That the Appellant's Statement shall contain:

(i) the Agreed Statement, with appropriate references to the relevant parts of the record,
(ii) the points intended to be argued,
(iii) a concise statement of the law relied upon and citations of authorities to be submitted for the consideration of the court,
(iv) Statutes and Regulations relevant to the issues.

11. That the Respondent's Statement shall contain:

(i) the points intended to be argued,
(ii) a concise statement of the law relied upon and citation of authorities to be submitted for the consideration of the court,
(iii) relevant Statutes and Regulations not included in the appellant's statement.

Chapter 14:

1. That the Rules of Practice include provisions whereby, at any stage of a proceeding whereof the decision of the court will ultimately be appealable to the Court of Appeal, a question of law directly affecting the rights of the parties may be submitted forthwith for the opinion of the Court of Appeal, provided that the attendant circumstances are in conformity with the requirements of the Rules of Practice with respect to such submissions.

Court of Appeal Office

Chapter 15:

1. That the office serving the Court of Appeal be reorganized under the joint control of (a) a manager of non-legal operations and (b) a chief legal officer

whose status would be that of a Master.

2. That the court office be adequately staffed in keeping with the requirements specified by the manager of non-legal operations and the chief legal officer.

3. That any activitiy now being performed by an appellate judge which does not require to be performed by a judge appointed pursuant to the Judges Act of Canada be performed by the chief legal officer and his staff.

4. That it be the joint responsibility of the manager of the non-legal operations and the chief legal officer (a) to achieve the greatest efficiency in the operation of the court office, (b) to study improvements in the operation of the court office to the end that it may better serve the litigants, their solicitors and counsel and the judges and (c) to initiate changes to this end.

Transcript

Chapter 16:

1. That it be the personal responsibility of the solicitors to bring before the court only those parts of the transcript of the trial evidence which are relevant to the issues which are to be argued on the hearing of the appeal.

2. That no transcript of trial evidence be required to be ordered until after the necessity for it has been agreed upon by the solicitors for the parties or determined by the chief legal officer of the court.

3. That all orders for transcript of trial evidence required for the hearing of an appeal be placed by the appellate court office, the solicitor for the appellant by filing his Notice of Appeal having undertaken to pay for the necessary copies of transcript; that no stenographic reporter who has attended and taken evidence at a trial shall prepare any transcript of his notes to fill any order placed otherwise than through the court office unless he has completed the delivery of all transcript ordered through the court office.

4. That, save in exceptional cases where the chief legal officer shall have granted an extension of time, the delivery of transcript of evidence be required to be made within 60 days of the placing of the order therefor and ultimately the requirement be that transcript be delivered within 30 days.

5. That, subject to the provisions hereinafter set out, the in-court control of the stenographic reporter continue to be in the presiding trial judge.

6. That the work required of stenographic reporters subsequent to the delivery of the trial judgment be under the control of the Chief Justice of Ontario; that he in consultation with the Chief Justice of the High Court have the right to require any reporter to refrain from attending Court for as long as is required for that reporter to complete and deliver any transcript of evidence required for the hearing of an appeal.

7. That the Ministry of the Attorney General provide a substitute reporter to take the place of any reporter so required to be absent from court.

8. That the court office be required to advise the Chief Justice of Ontario

when default in the delivery of transcript occurs or is reasonably to be anticipated.

9. That consideration be given to retaining the service of independent reporters whenever it be necessary to withdraw any reporter from attendance in court.

10. That the Ministry of the Attorney General explore the feasibility of letting contracts in selected larger centres for the provision of reporting services necessary for specified courts in or conveniently accessible to such centres.

Statistics and Forecasting

Chapter 18:

1. That the Attorney General assume the responsibility for creating the necessary framework for the projection of court needs in Ontario on a long term basis, for a period of at least 10 years and on the short term and specific basis for a period of 5 years. If the proposals of the White Paper are implemented our recommendations would be to direct this responsibility to the Office of Court Administration.

2. That studies be initiated with respect to the recording of statistics of court operations to the end that:

(a) all data which has a recognizable use be collected: no data for which a need cannot be demonstrated continue to be collected,

(b) one input of all statistics to be recorded be determined,

(c) the retrieval of data significant to any use be facilitated.

Appendix B

Comparative Summaries of Appellate Procedures

United States

Separate federal and state courts both at the trial and appeal level exist throughout the United States. Prior to 1891, there were no circuit courts of appeal: they were introduced in that year to afford relief to a seriously overworked Supreme Court of the United States and in the Federal Court system constituted an intermediate level. The Supreme Court of the United States, and many of these circuit courts of appeal, are now overloaded: for some time discussions have been going on seeking a pattern for their relief, but as yet no solution offered has met general acceptance.

In those states of which the population approaches or exceeds that of Ontario universally the state appellate system provides at least two levels of appeal courts, the higher of which is normally called the Supreme Court and is a court usually of seven members but not greater than nine members; access thereto is in practically all cases, by way of leave. Where there are more than one appellate court, the lower court usually is unlimited in size and is increased to accommodate the volume of work. In contrast, by the process of leave, the volume of work reaching the Supreme Court is limited to the capacity of that court to hear and determine cases. The two courts are successive levels of appeal and access to the Supreme Court is normally available after and only after an appeal has been heard by the lower court.

In the larger states the lower appellate court and sometimes the Supreme Court are under great pressure, and various devices have been introduced in order to increase the ability of the courts to dispose of appeals. It must be kept in mind that the American appellate system is essentially a written one; the time for oral argument is always limited or in some way rationed, and as a consequence, limitation on the amount of written argument is extremely difficult. The appearance of the "Brandeis Brief" is not uncommon and the volume of written briefs presented to the courts is enormous. Most of the time-saving devices which have been introduced in the lower appellate courts have been means of protecting members of the courts against the impact of this written argument. For reasons which will become apparent from the views which we express in a chapter dealing with written and oral argument, we do not think that these devices are appropriate to increase the capacity of Ontario courts to dispose of appeals.

England

England has a Court of Appeal in which there are two divisions, civil and criminal. It is not the highest court of final resort, since its decisions can be reviewed by the House of Lords.

Including ex officio members, there are seventeen members of the court of Appeal; since some,e.g., the Lord Chancellor, sit but infrequently; only about thirteen or fourteen are actively engaged in hearing appeals.

The population of England being some four to five times that of Ontario,

at first glance it appears to be amazing that a court of that size can serve such a population. However, many factors not existing in Canada combine to make this result possible.

An appellate jurisdiction of some breadth is vested in the Divisional Courts of the Queen's Bench and Chancery Divisions of the High Court of Justice. To an Ontario lawyer it appears peculiar that these courts normally sit in panels of two, with a provision that where there is a division of opinion between the two sitting members the case is re-argued before a court of three.

The operation of the criminal division of the Court of Appeal relies heavily on the judges of the Queen's Bench Division of the High Court. Each panel sitting to hear appeals includes at least one and sometimes two members of the Queen's Bench division; in the aggregate 50% of the judicial time devoted to the hearing of criminal appeals in court is provided by the Queen's Benches judges. In addition to this, single judges of the Queen's Bench Division annually read and dispose of some 6,500 written applications for leave to appeal to the criminal division.

The limitation of the right of audience in court to a branch of the legal profession especially qualified, does tend to reduce the number of appeals and along with other observable features reduces the time occupied by argument in court.

Superficially, the operation of the appellate courts in England and Ontario appears to be similar; on closer examination there are two features to the English system which accomplish conversion of the time of the Lords Justice of Appeal which are not to be found in Ontario. One lies in the fundamental concept of the nature of the courts' function; the other in the procedure for the disposition of appeals and application for leave to appeal to the Criminal Division of the Court of Appeal already referred to.

For the better understanding of the significance of the nature of the appeal as it is conceived to be in England it is necessary to describe briefly some of the procedures in Ontario.

The common law tradition accepts the purpose of an appeal as being to review the conduct of the trial and of the application of the law, in a face-to-face confrontation of the litigants' counsel and the reviewing court, during which counsel is afforded the opportunity to make all representation by which he considers he can persuade the Court to agree with him.

In the prevailing practice in Ontario, the appeal is initiated by a notice of appeal in which the rules of practice require to be set out the grounds on which the appellant proposes to rely. Nevertheless, the notice of appeal is completely uninformative as to the grounds upon which the appeal will ultimately be argued. As a consequence, until the appellant statement is prepared immediately prior to the hearing, neither the court nor the respondent is aware of the precise nature of the appeal or the issue which the Court will be asked to consider. Nor is the respondent required before that time to disclose whether he intends to support the judgment under appeal, and if so, the grounds upon which he will do so. Until recently as a preliminary to filing a notice of appeal, the appellant was required to order from the reporter, a transcript of all the trial proceedings in anticipation of the hearing of the appeal. He must prepare appeal books in which, unless he be relieved by the Court, are to be copied the pleadings and proceedings below and the exhibits admitted to trial. Some clarification of the issues is introduced by the

filing of the appellant and respondent's statement prior to the argument, but even these may be misleading since it is not uncommon for the appellant, at the opening of the argument, to inform the court that he does not propose to argue one or several of the grounds of appeal set out in his statement, a frustrating experience for the members of the court who have dutifully read the statement and familiarized themselves with the authorities cited in support of the grounds for appeal which are abandoned.

The report of the Committee on the Supreme Court procedure, 1953 (the Evershed Report) at page 189 outlines the practice then prevailing in England in terms which might well serve as a description of the present procedure in Ontario. That committee described the time-wasting consequences of the prevailing procedure, and after making references to some of the attractive features of the United States system of written briefs submitted to the court, made recommendation, which were later adopted.

The key recommendation made by that committee was that the notice of appeal be required to set out, with exactitude, the grounds of appeal and that, unless by amendment further grounds were introduced, only the grounds set out in the notice of appeal could be argued before the court.

That committee further recommended that the counsel engaged in the appeal should meet for the purpose of agreeing upon what documents and which passages of evidence were really relevant to the issues in the appeal, and that in the event of a disagreement, any document or passage of evidence objected to would be copied at the peril as to the cost of the party requiring the same.

The procedures adopted to implement the recommendations of the Evershed Report exemplified that the focal point of the proceedings is the in-court confrontation and that the preliminary procedure is directed to simplifying and expediting the route to the court and eliminating irrelevancies. The notice of appeal must state precisely (a) what findings of fact or issues of law would be an issue in the appeal; and (b) what precise order the court of appeal would be asked to make. A respondent who seeks any relief or proposes to support the judgment below on grounds other than those relied upon by that court must file a notice to that effect. The appellant in the first instance decides what part of the pleadings, exhibits and transcript of evidence are necessary for the proper argument of those grounds of appeals set out in the notice: subject to legitimate requests or demand of the respondent only those parts of this transcript and those exhibits go before the court. Since all orders for transcript are made through the office of the registrar, that officer has great influence with the solicitors and they rely on his help and assistance. Subject to the right of amendment on terms, the subsequent proceedings in any appeal are circumscribed by the issues specified in the notice of appeal and the progress of appeal is related thereto, similar to the manner in which an action of law is constituted by the allegations and claims in the statement of claim.

The precision with which the complaints are required to be set out and the orientation of the whole appeal to those complaints imparts to the appellate proceedings an exactitude and direction which is impossible to obtain if the proceedings are allowed to become out of focus with the complaints.

In addition the requirement that counsel must make a professional judgment as to what exhibits and what portions of the transcript are relevant to the issues on appeal drastically reduces the volume of paper presented to the court resulting in substantial saving of expense and time.

One of the outstanding differences resulting from the English practice is the appreciably smaller amount of transcript which is required to be produced. This is not only a great money-saving feature but is one of the chief manners in which the hearing of the appeal is expedited. The restriction of the reproduction of evidence and the copying of the exhibits to what is relevant to the issues which are actually to be argued before the court in the aggregate has reduced the amount of transcript to be prepared by the reporters to a minor part of the complete transcript. The reporters are enabled to deliver the required transcript, in all but the most unusual cases, within eight weeks of the delivery of the order to them. By way of contrast, in Ontario a delay of nine to twelve months is not uncommon.

The second feature leading to the saving of time of the Court of Appeal lies in the manner of dealing with applications for leave to appeal in criminal matters.

The provisions of the Criminal Code for appeals to conviction or sentence in proceeding by indictment were obviously copies from the provisions adopted in England in 1907.

In both countries, criminal appeals, save those on question of law alone, lie only by leave. Despite this similarity, the practice in Ontario is to hear contemporaneously the application for leave to appeal and the appeal.

In England, annually 6,500 applications for leave to appeal are filed, a number bearing to the population of England a proportion about equal to that between the number of applications made in Ontario and the population here.

All of these applications are accompanied by detailed grounds of appeal prepared by counsel.

In about 90% of the applications the appellant has been defended by counsel provided by legal aid; in these cases the trial counsel, regardless of whether he has been retained as counsel on the application for leave, is required to settle the grounds of appeal.

The Master of the Crown Office, who is the Registrar of the Criminal Appeal Division of the Court of Appeal, first processes the application and procures any part of the transcript he considers necessary for the disposition of the application.

Each application is sent to some member of the Queen's Bench Division and read by him: in 4,500 of the 6,500, leave is refused and no other action is taken. An unsuccessful applicant may have his application renewed before three members of the Criminal Appeal Division, but in doing so he runs the risk of having disallowance as time served, the time during which the renewed application is before the court. Only a small percentage of the appellants whose application have been refused seek to have their application renewed.

Appendix C

Exhibits from Statistics Canada – Catalogue 91-514

Assumption A

Here, the hypothesis is that the average pattern of interprovincial migration observed during the 1968-69 through 1970-71 period will continue in the future. As shown in Table 5.4, the level of gross in- or out-migration, however, is assumed at 450,000 a year throughout the projection period, or a net positive (or negative) migration of 73,000 per annum, compared to the observed average values of 435,000 and 71,000 a year respectively during this three-year period. Assumption A is thus intended to allow for a small increase in the absolute level, while the rate will by and large remain constant during at least the short term.

Assumption B

Instead of a three-year average as in the foregoing assumption, here it is supposed that future interprovincial migration patterns will resemble the average pattern experienced during the 1966-67 to 1970-71 five-year period. This assumption implies a gross in- or out-migration of 435,000 or a net positive (or negative) migration of about 59,000 a year as shown in Table 5.4.

Assumption C

On the basis of an examination of past trends in interprovincial migration of the Canadian-born population, it can be inferred that between 1931 and 1961 the attractive power of the (migration) gaining provinces upon the losing provinces has gradually diminished during these decades. Further, in considering the range of future possibilities, it is considered likely that employment opportunities and other social and economic differentials among the provinces, which have been widely held as being responsible for past and present migratory propensities, may tend to narrow down over the years. Consequently, it is postulated here that net migration of provinces will be one-half the level experienced during 1966-1971. This assumption will mean a net positive (or negative) interprovincial migration of about 29,000 a year over the projection period (Table 5.4).

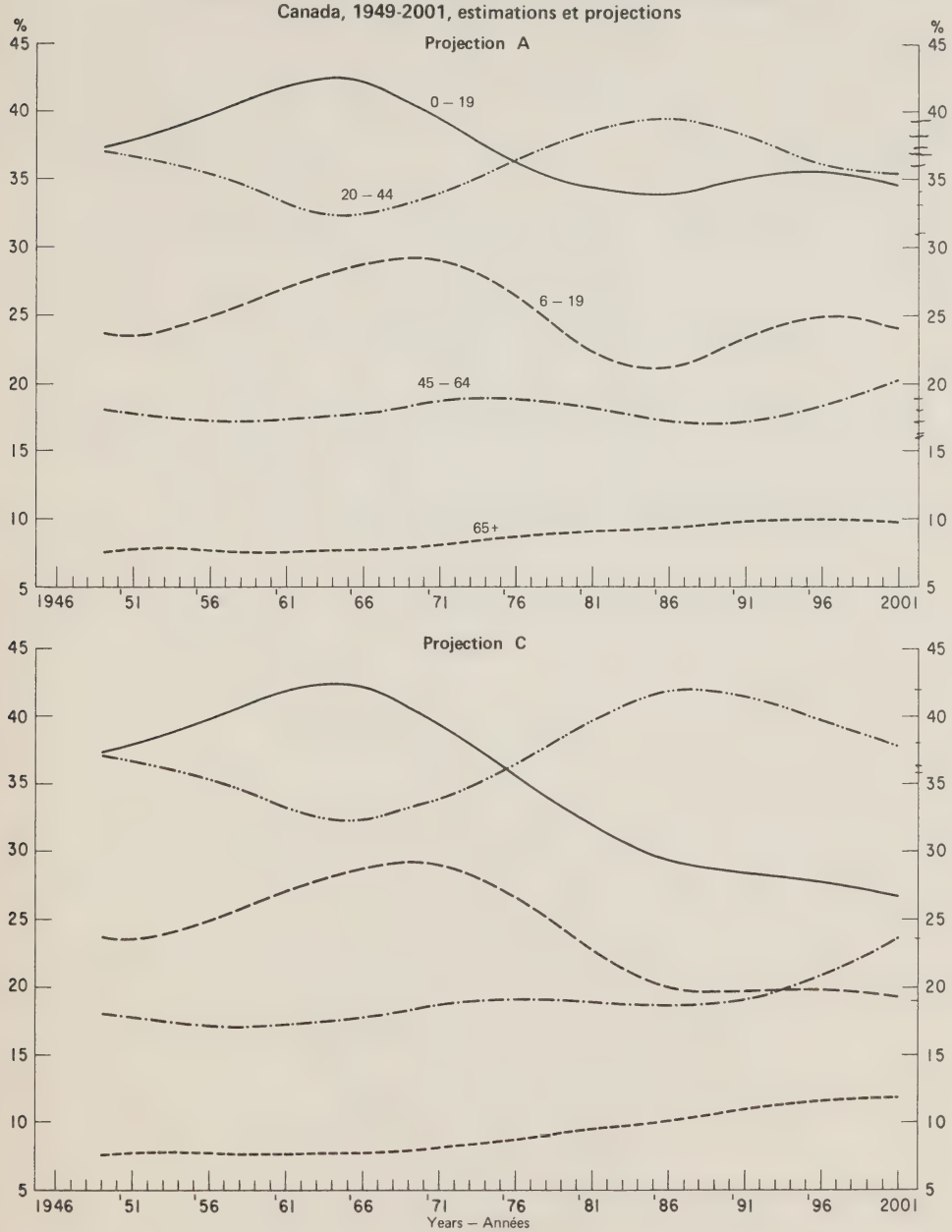
Assumption D

Like the preceding assumption, this is also offered specifically on the basis that economic opportunities will improve in the losing provinces. It differs, however, from the previous assumption in that the assumed levels and patterns are inferred from past trends. Table 5.4 presents the average volume of migration for the losing provinces in three "good" years and for the gaining provinces in three "bad" years during the decade 1961-1971. A "good" year is here defined as one in which a province lost fewer people or even gained people through net migration. Likewise, a "bad" year for a province is one in which they attracted fewer people or even lost some through net migration. Since the "good" or "bad" years differed for each province, the net migration would not add up to zero at the national level. Therefore, the figures for the losing provinces in 1961-1971 were added to yield what is known as "the out-migration basket". This "basket" was proportionately distributed among the gaining provinces according to the volume of average migration during their three "bad" years. The implied level of migration under Assumption D will be $\pm$ 22,000 a year and its pattern is shown in Table 5.4.

Chart 9.2

Actual and Projected Population in Specified Age Groups as a Percentage of Total Population, Canada 1949-2001

Évolution de la structure de la population par grands groupes d'âges, Canada, 1949-2001, estimations et projections



Appendix D

S.615 Criminal Code and S.22 of Criminal Appeal Act 1968 (U.K.)

SECTION 615 of the Criminal Code

615. (1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.

(2) An appellant who is in custody and who is represented by counsel is not entitled to be present

(a) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,

(b) on an application for leave to appeal, or

(c) on any proceedings that are preliminary or incidental to an appeal,

unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

(3) An appellant may present his case on an appeal and his argument in writing instead of orally, and the court of appeal shall consider any case of argument so presented.

(4) The power of the court of appeal to impose sentence may be exercised notwithstanding that the appellant is not present. 1953-54, c. 51, s. 594; 1968-69, c. 38, s. 61.

* * * * *

CH. 19

Criminal Appeal Act 1968 (U.K.)

The hearing

22.--(1) Except as provided by this section, an appellant shall be entitled to be present, if he wishes it, on the hearing of his appeal, although he may be in custody.

(2) A person in custody shall not be entitled to be present
(a) where his appeal is on some ground involving a question of law alone; or
(b) on an application by him for leave to appeal, or
(c) on any proceedings preliminary or incidental to an appeal; or
(d) where he is in custody in consequence of a verdict of not guilty by reason of insanity or of a finding of disability,

unless the Court of Appeal give him leave to be present

(3) The power of the Court of Appeal to pass sentence on a person may be exercised although he is for any reason not present.